Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1623

FIDELITY CORPORATION,

Petitioner,

v.

REGAL WARE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RICHARD ALLEN REPP
Hirschler, Fleischer, Weinberg,
Cox & Allen
4 North Fourth Street
Richmond, Virginia 23219

Attorney for Petitioner

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IN THE

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No.

FIDELITY CORPORATION,

Petitioner,

v.

REGAL WARE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the yet-unpublished judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on January 11, 1977. A copy of the opinion is submitted under separate cover in accordance with Rule 23. However, only page 48, Section XII, is relevant to the question raised in this Petition.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 11, 1977, and rehearing was denied on April 7, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Other jurisdictional data required by Rule 23 is set forth herein as part of the Statement of the Case.

STATEMENT OF THE CASE

On August 20, 1974, at the conclusion of a three-day trial, District Judge Robert R. Merhige, Jr., presiding in the United States District Court for the Eastern District of Virginia, dictated from the bench his Findings of Fact and Conclusions of Law in this case. The court's decision that Fidelity Corporation was not liable to Regal Ware, Inc. for the indebtedness of American Foresight, Inc., a Fidelity subsidiary, was incorporated in a Judgment Order of August 28, 1974, entered *nunc pro tunc* to August 20, 1974. (Exhibit A)

On August 28, 1974, Regal Ware, Inc. (hereinafter "Regal") filed in the District Court a "motion" for a new trial and to alter or amend, purportedly pursuant to Rule 59(e) F.R.C.P. However, this "motion" *stated no grounds whatsoever*, admitting instead that it was "for reasons to be assigned." (Exhibit B) The grounds for the "motion" were stated in a memorandum mailed to the District Court and counsel for Fidelity Corporation (hereinafter "Fidelity") on October 10, 1974, *43 days after the deadline for filing the motion.*

On December 5, 1974, Regal filed its notice of appeal of this case to the United States Court of Appeals for the Fourth Circuit. *This notice of appeal*

was filed 107 days after the date of entry of the judgment by the District Judge, whereas the Federal Rules of Appellate Procedure require that it be filed within 30 days. (Exhibit C) Fidelity filed a motion to dismiss the appeal for failure to file a timely notice of appeal; again raised the point on brief, and presented it for a third time in its Petition for Rehearing, all of which were denied by the Court of Appeals without explanation. It is from the latter Denial Order dated and entered February 23, 1977, (Exhibit D) that this Petition emanates.

SOLE QUESTION PRESENTED FOR REVIEW

Does a United States Court of Appeals have *jurisdiction* to hear and decide a case where the notice of appeal is filed 107 days after the date of entry of judgment by the District Court, when Rules 3 and 4 of the Federal Rules of Appellate Procedure require such filing to be made within 30 days after the date of entry of judgment and the only interim pleading is a so-called "motion" that states no grounds therefor?

FEDERAL RULES INVOLVED

The principal rules involved in this Petition are Rules 59(e) and 7(b)(1) of the Federal Rules of Civil Procedure, and Rules 4(a) and 26(b), Federal Rules of Appellate Procedure, which state in pertinent part as follows:

> Rule 59(e): "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 7(b)(1): "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." (Emphasis supplied)

Rule 4(a): "In a civil case * * * in which an appeal is permitted by law as of right from a district court to a court of appeals *the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from*; * * *

"The running of the time for filing a notice of appeal is terminated as to all parties by a timely *motion* filed in the district court by any party pursuant to the Federal Rules of Civil Procedure . . ." (Emphasis supplied)

Rule 26(b): "The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; *but the court may not enlarge the time for filing a notice of appeal . . .*" (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

The writ of certiorari should be granted in this case for the following extremely important reasons:

1. The United States Court of Appeals for the Fourth Circuit has rendered a decision which is in conflict with decisions of other courts of appeals on the same matter.

2. The decision of the United States Court of Appeals for the Fourth Circuit on the Federal Rules question presented for review conflicts with the decisions of the Supreme Court of the United States,

and this conflict must be resolved if such rules are to be uniformly and predictably applied.

ARGUMENT

A primary purpose for adoption of both the Federal Rules of Civil Procedure (hereinafter "F.R.C.P.") and the Federal Rules of Appellate Procedure (hereinafter "F.R.A.P.") was to assure prompt, procedurally-defined treatment of cases in the Federal Courts. The rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 1, F.R.C.P. Recognizing that motions frequently are time-consuming in nature, Rule 7, F.R.C.P., specifically incorporates in (b)(2) the requirements of Rule 11, F.R.C.P., that a motion not be interposed for delay. [See "The Ethics of Dilatory Motion Practice: Time for Change" by the Honorable David N. Edelstein, Chief Judge, Southern District of New York, 44 Fordham L. Rev. 1069 (1976)]. Likewise, while Rule 2, F.R.A.P., affords the Courts of Appeals some latitude in modifying those rules, it specifically states by incorporation the Rule 26, F.R.A.P., directive that "*the court may not enlarge the time for filing a notice of appeal . . .*" (Emphasis supplied)

Yet the Court of Appeals for the Fourth Circuit has enlarged the time for filing of a notice of appeal from the 30 days required by Rules 3 and 4, F.R.A.P., to 107 days by treating as valid a "motion" that did not become a valid motion until 43 days after the filing deadline.

Rule 3(a), F.R.A.P., goes out of its way to emphasize that the *validity* of an appeal depends on timely filing of a notice of appeal, and Rule 4(a), F.R.A.P., firmly

establishes the 30 day time limit for such filing. Rule 4 *does* permit termination of the time period if a timely motion is filed under Rule 59, F.R.C.P., to alter or amend a judgment. But in order to be a motion at all, an application must "*state with particularity the grounds therefor . . .*" [Rule 7(b)(1), F.R.C.P.] (Emphasis supplied)

> "Suppose that a purported motion is timely made but is defective by reason of its failure to state any ground for relief with sufficient particularity. Does such a motion terminate the running of the time for appeal? In *Fine v. Paramount Pictures* [181 F.2d 300 (7th Cir., 1950)] it was held that an oral motion for a new trial without reasons assigned therefor did not terminate the time for appeal because the district court was without authority to hear and act upon it. While there is authority to the contrary, that holding appears sound; a motion without any assignment of reasons is hardly a motion." 9 *Moore's Federal Practice* 961

This case does not involve an oral motion, but the principle is the same. *Nor does this case involve a ruling by any court that Regal was misled into thinking that its motion was adequate to terminate the running of the 30 day filing limitation for its notice of appeal, or that there was excusable neglect.* The sole issue presented is whether a Court of Appeals can ignore the mandate of Rules 2, 3, 4, and 26, which in the aggregate state that the notice of appeal *must* be filed within 30 days after the entry of judgment, and yet acquire jurisdiction to hear and decide the case by treating as valid a written "motion" that states no grounds.

The Fourth Circuit stands alone in its apparently affirmative response to this question.

Conversely, this Court has held that timely filing of a notice of appeal is both *mandatory and jurisdictional*, and without it the appellate court is without authority to hear the case. *United States v. Robinson*, 361 U.S. 220, 80 S. Ct. 282, 4 L.Ed.2d 259 (1960); *Coppege v. United States*, 369 U.S. 438, 82 S. Ct. 917, 8 L.Ed.2d 21 (1962); *Berman v. United States*, 378 U.S. 530, 84 S. Ct. 1895, 12 L.Ed.2d 1012, *rehearing denied* 379 U.S. 871, 85 S. Ct. 14 (1964). For in the absence of extenuating circumstances, a principle necessary for the orderly administration of justice must prevail, that being "the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases whose review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." *Federal Trade Com. v. Minneapolis-Honeywell R. Co.*, 344 U.S. 206, 73 S. Ct. 245, 97 L.Ed. 245 (1952).

The cases in the various circuits following the rule that timely filing of a notice of appeal is a *prerequisite* to appellate jurisdiction are myriad. Accordingly, only a few of these will be cited here, this being solely for the purpose of establishing the divergence between the practical effect of the Fourth Circuit's holding in the present case and some of the holdings elsewhere.

SECOND CIRCUIT: Stirling v. Chemical Bank, 511 F.2d 1030 (1975); *Federal Deposit Insurance Corp. v. Congregation Poiley Tzedeck*, 159 F.2d 163 (1946)

THIRD CIRCUIT: Boggs v. Dravo Corporation, 532 F.2d 897 (1976); *Rothman v. United States*, 508 F.2d 648 (1975)

FIFTH CIRCUIT: Burnside v. Eastern Airlines, Inc., 519 F.2d 1127 (1975); *Lashley v. Ford Motor Co.*, 518 F.2d 749 (1975)

SEVENTH CIRCUIT: Brainerd v. Beal, 498 F.2d 901 (1974), *cert. denied* 419 U.S. 1069, 95 S. Ct. 655, 42 L.Ed.2d 664 (1974), *rehearing denied* 420 U.S. 913, 95 S. Ct. 836, 42 L.Ed.2d 844 (1975); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609 (1962)

EIGHTH CIRCUIT: United States v. 1,431.80 Acres of Land, Etc., Cross Cty, Ark., 466 F.2d 820 (1972); *Young v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 369 F.2d 502 (1966)

NINTH CIRCUIT: United States v. Molitor, 337 F.2d 917 (1964); *Smith v. United States*, 272 F.2d 228 (1959), *cert. denied* 362 U.S. 954, 80 S. Ct. 868, 4 L.Ed.2d 871 (1960), *rehearing denied* 362 U.S. 992, 80 S. Ct. 1080, 4 L.Ed.2d 1024 (1960).

TENTH CIRCUIT: Gooch v. Skelly Oil Company, 493 F.2d 366 (1974) *cert. denied* 419 U.S. 997, 95 S. Ct. 311, 42 L.Ed.2d 270; *Lathrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (1971), *cert. denied* 404 U.S. 840, 92 S. Ct. 132, 30 L.Ed.2d 73 (1971).

If compliance with the time limits set forth in Rule 4, F.R.A.P., is mandatory and jurisdictional, and the Court of Appeals is specifically precluded from enlarging the time permitted for filing a notice of appeal, on what basis does the Fourth Circuit Court of Appeals gain jurisdiction of a case when the notice of appeal is filed 107 days after entry of judgment? No motion was filed that could toll the time for filing. Nor was the District Court ever asked to extend the time for filing the notice of appeal, as it is empowered to do for "excusable neglect" under Rule 4. And the Court of Appeals thrice declined to state its basis for assuming jurisdiction, notwithstanding Fidelity's express request

that it do so. (See Section VI of Fidelity's Petition for Rehearing, attached as Exhibit E)

Possibly the Fourth Circuit Court of Appeals now has expanded on the language of *Witt v. Merrill*, 208 F.2d 285 (4th Cir. 1953), a case involving an oral motion, to say, in effect, that a Court of Appeals may, on its own initiative, expand the period for filing a notice of appeal if, in its opinion, such expansion would be "in the spirit of the rules" *Witt v. Merrill, supra*, at p. 286. [See also *Fishbaugh v. Armour & Co.*, 185 F.2d 541, 542 (4th Cir. 1950)] Should this in fact be the basis for the Fourth Circuit Court of Appeals' decision in the instant case, it should be reviewed by the Supreme Court of the United States, as it not only is in direct conflict with holdings in this Court and the Appeals Courts of other circuits, but is in flagrant violation of Rules 4 and 26, F.R.A.P. *Courts of Appeal are not permitted to regulate their practice in a manner inconsistent with the Federal Rules of Appellate Procedure.* Rule 47, F.R.A.P.

Case-by-case tailoring of the Federal Rules defeats their purpose. While mechanical rules may appear harsh in some cases (although not in the instant case!), they are necessary to achieve uniformity and eliminate procedural uncertainties. *United States v. Indrelunas*, 411 U.S. 216, 93 S. Ct. 1562, 36 L.Ed.2d 202 (1973).

Granting certiorari in this case will clarify an important aspect of the Federal Rules of Appellate Procedure significant to every Federal Court litigant. Rules cease to be rules when those subject to them can no longer rely on their uniform application.

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the judgment of the United States Court of Appeals for the

Fourth Circuit, and the judgment vacated for want of jurisdiction.

Respectfully submitted,

RICHARD ALLEN REPP
Hirschler, Fleischer, Weinberg,
Cox & Allen
4 North Fourth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

In accordance with the provisions of Rules 21 and 33, Revised Rules of the Supreme Court of the United States, I hereby certify that I have filed forty (40) copies of the foregoing Petition for a Writ of Certiorari in the Clerk's Office, Supreme Court of the United States, and served three (3) copies each upon Israel Steingold, Esq., and upon Steingold and Steingold, counsel of record for Regal Ware, Inc. at 1116 United Virginia Bank Building, Norfolk, Virginia, 23514 and 4905 Radford Avenue, Richmond, Virginia, 23230, their last known addresses, respectively, by depositing same in the United States Mail, first class postage prepaid, this day of May, 1977.

RICHARD ALLEN REPP

FILED
AUG 28 1974
CLERK, U. S. DIST. COURT
RICHMOND, VA.

EXHIBIT A

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF VIRGINIA –
RICHMOND DIVISION

Civil Action File No. 73-460-R

REGAL WARE, INC.

vs. JUDGMENT

FIDELITY CORPORATION

This action came on for trial before the Court, Honorable Robert R. Merhige, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing; and that the defendant, FIDELITY CORPORATION, recover of the plaintiff, REGAL WARE, INC., its cost of action.

Dated at Richmond, Virginia, this 28th day of August, 1974, nunc pro tunc the 20th day of August, 1974.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ [illegible]
Deputy Clerk

A
COPY
TESTE:
W. FARLEY POWERS, JR., CLERK
BY: /s/ [illegible]
DEPUTY CLERK

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

REGAL WARE, INC.,	:	
Plaintiff,	:	
vs.	:	
	:	CIVIL ACTION
FIDELITY CORPORATION,	:	NO. 73-460-R
and	:	
AMERICAN FORESIGHT, INC.,	:	
Defendants.	:	

MOTION FOR NEW TRIAL AND TO ALTER OR AMEND JUDGMENT

Pursuant to the provisions of Rule 59(a) and (e), FRCP, plaintiff moves the Court to open the judgment entered in this action in favor of Fidelity Corporation on August 20, 1974, take additional testimony, amend the findings of fact and conclusions of law and make new findings and conclusions and direct the entry of a new judgment; and to alter or amend said judgment, for reasons to be assigned upon receipt of transcript from the Court Reporter of the Court's Findings of Fact and Conclusions of Law announced by it on the 19th day of August 1974.

/s/ Israel Steingold
Israel Steingold
Attorney for Plaintiff
1116 United Virginia Bank Bldg.
Norfolk, Virginia

I certify I served a copy of the foregoing Motion for New Trial and to Alter or Amend Judgment on counsel for the defendant by mailing a copy thereof to the office of Richard A. Repp, Esq., Hirschler and Fleischer, 4 North 4th Street, Richmond, Virginia 23219, on the 27th day of August 1974.

/s/ Israel Steingold
Israel Steingold

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

REGAL WARE, INC., Plaintiff,	:	
vs.	:	CIVIL ACTION NO. 73-460-R
FIDELITY CORPORATION, Defendant.	:	

NOTICE OF APPEAL

Notice is hereby given that Regal Ware, Inc., plaintiff above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment in favor of said defendant entered on the 20th day of August 1974, and from the order denying plaintiff's Motion for New Trial and Motion to Alter or Amend said judgment, entered in this action on the 8th day of November, 1974.

/s/Israel Steingold
ISRAEL STEINGOLD
Attorney for Regal Ware, Inc.
1116 United Virginia Bank Bldg.
Norfolk, Virginia 23514

December 4, 1974

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
FEB 23 1977
U. S. COURT OF APPEALS
FOURTH CIRCUIT

No. 75-1219

REGAL WARE, INC.
Appellant

v.

FIDELITY CORPORATION
and AMERICAN FORESIGHT, INC.
Appellees

ORDER

No request for a poll of the court having been made, rehearing en banc is denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrences of Judge Winter and Judge Craven.

/s/ [illegible]
For the Court

A True Copy, T e s t e:
William K. Slate, II, Clerk
By /s/ Emily Rueger
Deputy Clerk

EXHIBIT E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REGAL WARE, INC., Appellant	)	
v.	)	CASE NO. 75-1219
FIDELITY CORPORATION, Appellee	)	

PETITION FOR REHEARING IN BANC

To The Honorable Judges of the United States Court of Appeals for the Fourth Circuit

Fidelity Corporation, the defendant-appellee above named, presents this petition for rehearing of this cause, in which, by opinion dated January 11, 1977, it was held liable for the debt of American Foresight, Inc. to the appellant in the amount of $210,571.96 with interest from July 3, 1973, and in support hereof respectfully shows as follows:

VI.

THIS COURT IS WITHOUT JURISDICTION TO HEAR THIS APPEAL.

Rule 4 of the Federal Rules of Appellate Procedure provides that "the notice of appeal . . . shall be filed with the Clerk of the District Court within 30 days of the entry of the judgment or order appealed from." It is conceded that no such notice of appeal was filed within the 30-day period by Regal.

Regal contends that within the 10-day period provided for under Rule 59 F.R.C.P. it filed a purported motion under Rule 59(e) to alter or amend the judgment, thereby tolling the 30-day period specified in Rule 4. However, when the "motion" was filed it stated no grounds and assigned no error.

Rule 7(b)(1) F.R.C.P. states that a motion "shall be made in writing, *shall state with particularity the grounds therefor,* and shall set forth the relief sought." (Italics added)

Since no grounds whatsoever were stated in the "motion," it was therefore ineffective as a motion and cannot serve to toll the time for filing the notice of appeal. See *Fine v. Paramount Pictures,* 181 F.2d 300 (7th Cir. 1950).

Although this Court in the case of *Witt v. Merrill,* 208 F.2d 285 (4th Cir. 1953), distinguished the *Fine* case, *supra,* the points of distinction are not applicable to the present case. The only argument set forth by Regal is that it was misled by Judge Merhige into believing it had additional time. Judge Merhige has by letter stated he has no such recollection, and attached as Exhibit A is Judge Merhige's letter dated August 6, 1975.

Accordingly, since the period for filing the notice of appeal was not stayed by a properly filed motion, the time for filing the notice of appeal under Rule 4 F.R.A.P. has not been complied with and the court is without jurisdiction in this case. The United States Supreme Court has determined that timely filing of a notice for appeal is both mandatory and jurisdictional. See *United States v. Robinson*, 361 U.S. 220 (1960).

In the event this Court holds Regal's notice of appeal to have been timely filed, its reasons therefor should be stated, not only to enlighten counsel but also to provide a basis for review, since the Fourth Circuit at this time appears to be in conflict with other Circuit Courts. See text and cases cited at 9 Moore's Federal Practice, 2d Ed., pp. 960-962.

VII.

For these reasons it is most earnestly and beseechingly urged that this Petition for Rehearing *In Banc* be granted.

Respectfully submitted,

FIDELITY CORPORATION

By: /s/ Richard A. Repp
Richard A. Repp, Of Counsel

Richard A. Repp
Everette G. Allen, Jr.
Hirschler, Fleischer, Weinberg,
Cox and Allen
4 North 4th Street
Richmond, Virginia 23219

Supreme Court, U. S.
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MAY 20 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-1623

REGAL WARE, INC.,

Appellant,

v.

FIDELITY CORPORATION
and AMERICAN FORESIGHT, INC.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued November 12, 1975

Decided January 11, 1977.

Before, WINTER, CRAVEN, and WIDENER,
Circuit Judges

Israel Steingold (Jeffrey M. Steingold on brief) for Appellant; Richard A. Repp (Hirschler, Fleischer, Weinberg, Cox and Allen on brief) for Appellees.

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IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1219

REGAL WARE, INC.,

Appellant,

v.

FIDELITY CORPORATION
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Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued November 12, 1975 **Decided January 11, 1977.**

Before, WINTER, CRAVEN, and WIDENER,
Circuit Judges

Israel Steingold (Jeffrey M. Steingold on brief) for Appellant; Richard A. Repp (Hirschler, Fleischer, Weinberg, Cox and Allen on brief) for Appellees.

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 75-1219

REGAL WARE, INC.,

Appellant,

v.

FIDELITY CORPORATION
and AMERICAN FORESIGHT, INC.,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Argued November 12, 1975 Decided January 11, 1977.

Before, WINTER, CRAVEN, and WIDENER,
Circuit Judges

Israel Steingold (Jeffrey M. Steingold on brief) for Appellant; Richard A. Repp (Hirschler, Fleischer, Weinberg, Cox and Allen on brief) for Appellees.

WIDENER, Circuit Judge:

In this diversity case, appellant, Regal Ware, Inc., a Wisconsin corporation, sued Fidelity Corporation (hereafter Fidelity) and American Foresight, Inc., both Virginia

corporations, in the United States District Court for the Eastern District of Virginia. The district court entered judgment against American Foresight in the amount of $210,571.96, with interest from July 3, 1973 until paid, but dismissed Regal Ware's suit against Fidelity Corporation. American Foresight, an insolvent and largely liquidated corporation, has not appealed from the judgment against it. The amount owing is not in dispute. Regal Ware has appealed from the dismissal of its suit against Fidelity Corporation. We vacate and remand.

I(A)

Appellant, Regal Ware, is engaged in the business of manufacturing kitchen ware. American Foresight was engaged in the business of selling kitchen ware and similar items, at retail, primarily on credit. The present suit is for goods purchased for resale on open account by American Foresight from Regal Ware, largely during the months of June, July, and August 1972, and is for the amount still owing to Regal Ware on account of said purchases.

(B)

From around 1965 until June of 1970, Regal Ware did business with a predecessor of American Foresight, a Delaware corporation, also known as American Foresight (hereafter Delaware American Foresight). Its principal place of business was in Philadelphia. The two principal stockholders and officers of Delaware American Foresight were Edward M. Satell, President, and William C. Beery, Chairman of the Board of Directors. Satell was the principal manager of the corporation, and Beery was, in actual practice, subordinate to Satell.

By 1969 or 1970, Delaware American Foresight, on account of purchases of goods for resale, was indebted to Regal Ware in an amount around $145,000. Because of the amount of this indebtedness, Regal Ware limited the credit of Delaware American Foresight to $50,000 and worked out an arrangement under which the debt would be liquidated over a period extending through 1971.

In May and June of 1970, a radical reorganization occurred. All of the assets and liabilities of Delaware American Foresight were transferred to American Foresight, a Virginia corporation[1] (hereafter Virginia American Foresight), one of the defendants in this case. The sole owner of all the capital stock of Virginia American Foresight was Fidelity Corporation,[2] the appellee herein.

Fidelity Corporation (Fidelity) is a Virginia corporation with headquarters in Richmond, Virginia. It is strictly a holding company, which owns the stock of around 30 operating companies, such as Virginia Foresight, and several other subordinate holding companies. Most, but not all, of the companies owned by Fidelity are financial or insurance institutions.

---

[1] The principal office continued to be in Philadelphia.

[2] Formally, the stock of Foresight was owned by either Drum International, a Virginia corporation, or Drum International, a Delaware corporation. The stock of both of the Drum corporations was owned completely by Fidelity Corporation. The record is not clear as to which Drum International owned the stock of Foresight. The matter is of no consequence because all significant decisions regarding Foresight were made by officers of Fidelity Corporation. There is no argument that, for all purposes relevant here, Fidelity was the owner of all the stock in Virginia American Foresight.

The reason Fidelity desired to acquire Delaware American Foresight[3] was to avail itself of a distinctive method of marketing. Delaware American Foresight had been in the practice of marketing its product primarily by the use of college students during the summer months. It had an arrangement with the students which was very attractive from their point of view. Since a number of the subsidiaries of Fidelity were in the insurance field, and since a number of customers of these subsidiary insurance companies were college students, Fidelity believed that the Foresight sales personnel could be trained and worked into the sale of insurance. Especially, it was hoped that some of these summertime salesmen would accept regular sales assignments with various of Fidelity's insurance subsidiaries when they completed college. The district court judicially noticed, and it was stipulated, that Fidelity knew of the financial condition of Delaware American Foresight at the time of the acquisition. In payment for the assets of Delaware American Foresight, Fidelity delivered to the stockholders of that company, principally Edward M. Satell and William C. Beery, 18,000 shares of Fidelity stock. An additional 190,000 shares were placed in escrow to be delivered to the same parties over a period of five years as specified earning standards were attained. The operation and management of Virginia American Foresight was placed by Fidelity, for the time being, in the

[3] The transition from Delaware American Foresight to the present Virginia American Foresight was somewhat more elaborate than stated. A Virginia corporation, AF, Inc., was created by Drum International, actually Fidelity. By agreement of May 26, 1970, all the assets of Delaware American Foresight were conveyed to AF, Inc., which assumed all the liabilities of the Delaware company. This agreement was participated in by Fidelity, AF, Inc., Delaware American Foresight and Edward M. Satell and William C. Beery, the principal stockholders of Delaware American Foresight. Subsequent to the sale the name of AF, Inc., was changed to American Foresight, a Virginia corporation, the present Virginia Foresight.

hands of Satell and Beery,[4] thus remaining as it had been under the Delaware corporation.

After the events of May and June 1970, the fact that Delaware American Foresight had been acquired by Fidelity was made known to Regal Ware by Satell. As a result of that acquisition, the credit limitation which Regal Ware had presviously placed upon Delaware American Foresight was removed. Regal Ware admitted, however, that Fidelity did not guarantee the accounts of Virginia American Foresight, and it is not contested that Fidelity did nothing to justify a belief that it would be responsible for those accounts as a guarantor or security or the like.

Prior to its acquisition by Fidelity, Delaware American Foresight had created a subsidiary by the name of East Coast Associates (hereafter East Coast).[5] East Coast was incorporated in Massachusetts and its principal place of business was in Boston. Later, the office of East Coast was moved to Philadelphia, and still later to a part of the same building which housed the head office of Foresight (both Delaware and later Virginia American Foresight) and adjacent thereto. After Virginia American Foresight acquired the property of Delaware American Foresight, East Coast continued as a wholly owned subsidiary of Virginia American Foresight.

East Coast was, in effect, a financing and collecting agency for Virginia American Foresight (references to Foresight after this point are to Virginia American Foresight unless otherwise

[4] Satell and Beery also entered into employment contracts with AF, Inc., on June 26, 1970. The compensation was to be the same as they had received from Delaware American Foresight. In a later suit filed, that compensation was alleged to be $43,000 per year for each, plus certain pension contributions.

[5] We were told at oral argument that the stock ownership of East Coast may have been more diverse prior to its acquisition by Fidelity. Even if so, this would not bear on our decision, for at all times pertinent here East Coast may be considered a wholly owned subsidiary of Virginia American Foresight which acquired the East Coast stock as an asset of Delaware American Foresight.

indicated). Most of Foresight's sales were on a credit basis, and the paper generated by that company was sold to East Coast. The capitalization of both Foresight and East Coast was nominal. In order that East Coast would have money to buy the paper produced by Foresight, Fidelity arranged for a loan of $800,000 from Fidelity Bankers Life Insurance Company, another subsidiary of Fidelity.[6] Later Fidelity arranged additional credit of $1,500,000 with two New York banks[7] which Fidelity guaranteed. Also, the $800,000 loan from Fidelity Bankers Life Insurance Company was subordinated to the loans by the two New York banks.

Immediately following the acquisition by Fidelity, the former management remained in control of Foresight and East Coast.[8] The board of directors of Foresight consisted of six: Edward M. Satell, William C. Beery and Albert W. Schiffrin (who had acted as attorney for Satell and Beery), Albert L. Hobbs, Richard H. Guilford and Edward D. Simon. The three latter named directors were representatives of Fidelity. Satell was President and Beery was Chairman of the Board and Secretary-Treasurer. The directors of East Coast were Satell, Beery and Schiffrin; Satell was President and Beery was Clerk and Treasurer. Joseph M. Mizelle, an employee of Fidelity, acted as liaison officer between Fidelity and Foresight.

By December 1971, Foresight had liquidated its former debt to Regal Ware.

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[6] Previously, the function of providing credit for East Coast was performed by an independent factor, Talcott, Inc.

[7] First National City Bank, New York City, and Security National Bank, Melville, New York, each provided credit for East Coast in the amount of $750,000.

[8] Representatives of Fidelity testified that it was the general policy of that holding company to keep the management of its various subsidiaries autonomous.

II

By February 1972, tension had developed between Satell and Beery, and the management of Fidelity.[9] On February 10, 1972, Fidelity, as sole stockholder of Foresight, amended the bylaws to increase the size of the board of directors of Foresight from six to eight. Alan G. Fleischer and Joseph M. Mizelle[10] were added as directors, thereby giving Fidelity at least a five to three control on the board of Foresight. On March 3, 1972, the new board of Foresight increased the board of directors of East Coast from three to nine, adding six Fidelity oriented directors.[11] Also, Richard J. Maccarone[12] replaced Satell as President and chief executive officer of East Coast and Charles D. Robinson replaced Beery as clerk.

On April 3, 1972, the board of directors of Foresight met and enacted the following resolution:

> "RESOLVED: That a dividend of $53.942 per share consisting of advances receivable from Edward M. Satell amounting to $36,536 and William C. Beery in the amount of $17,406, a total of $53,942, is hereby declared out of capital surplus on the Common Stock of this Company payable on April 7, 1972 to stockholders of record at the close of business on April 3, 1972."

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[9] The exact cause for the tension is not clear from the record. There is a suggestion that it may have been because of the practice of "upstreaming" by Foresight (see text at footnote 16, infra). However, some of the witnesses on behalf of Fidelity testified that that company was not aware of the upstreaming practice until the summer of 1972.

[10] Mizelle was already serving as liaison officer between Fidelity and Foresight.

[11] Alan G. Fleischer, Richard H. Guilford, Albert L. Hobbs, Richard J. Maccarone, Joseph M. Mizelle and Edward D. Simon.

[12] Maccarone may be regarded as Fidelity oriented by this time, although he had been an employee of Delaware American Foresight before the acquisition by Fidelity.

Satell, Beery and Schiffrin did not participate in the meeting of April 3rd, but Schiffrin wrote a letter on behalf of Satell, Beery and himself objecting to the legality of said action. As requested, the letter was attached to the minutes.

The explanation given for the dividend, or assignment, as stated by Charles D. Robinson, Senior Vice-President and Secretary of Fidelity, follows:

> "It [the dividend] was largely on the advice of counsel in that it was an assessment of American Foresight representing money due it by Messrs. Satell and Beery, an amount that had been due at the time the business was acquired almost two years previously. It had been unchanged in amount. We were beginning to get concerned about these two gentlemen and whether in some manner the assets might be satisfied in an improper manner. We felt that to preserve this asset, that it should be passed up through Drum International to Fidelity Corporation. . . . The dividend consisted specifically of this asset."

The district court made no finding as to the business judgment of the action taken by Fidelity on April 3, 1972, or of whether its mistrust of Satell and Beery was justified, but found that the taking of the action was based upon the belief that such was necessary to protect this asset of Foresight. Fidelity, said the district court, took this action "obviously for its own ultimate benefit, but also for the benefit of other creditors."[13]

Alan G. Fleischer, an attorney at law and a member of the Board of Directors of Foresight which voted the April 3, 1972 dividend,[14] testified that he considered the dividend legal because Foresight was not insolvent at the time it was voted. The district judge made no finding as to the solvency of Foresight at the time of said dividend. Richard T. Guilford,

[13]Quotation is from the opinion of the district court from the bench.

[14]Fleischer was a member of the firm of Fleischer and Fleischer, which were general counsel for Fidelity, and was a member of the board of directors of Fidelity as well as that of Foresight.

Executive Vice-President of Fidelity, testified that Foresight was solvent at that time if $200,000,[15] allocated to good will, could be considered. Otherwise, at that time the assets of the company were $2,161,629, whereas the liabilities were $2,322,335. There is testimony that the so-called "good will" of a company is a fictitious amount added to the assets of a company in order to make the value of property actually obtained correspond to its book value. The district court considered it "isn't worth much" in finding Foresight insolvent in September 1972, and there is no indication the good will had any value in April.

Actually, these obligations of Satell and Beery, assigned to Fidelity, were used by that company in settling claims made by them in litigation with Fidelity and Foresight during the final liquidation of Foresight. This aspect of the case is discussed more fully infra.[15a]

III

During the months of June, July, and August 1972, a debt of $210,571.96 (the amount of the judgment entered by the district court) from Foresight to Regal Ware was built up. This sum makes allowances for unsold goods returned to Regal Ware. Terms of sales from Regal Ware to Foresight were 90 days during the summer and 30 days thereafter. Although payments were made from time to time, additional credit was extended. The first Regal Ware knew that it could not expect payment in full was when Fidelity offered a 20 percent settlement to all the creditors of Foresight. Regal Ware declined the offer.

[15]The book value of good will was $282,166.

[15a]See text at footnote 4, and the footnote, and text at footnotes 29 and 32, infra.

During the summer of 1972, the state of tension between Foresight, as represented by Satell and Beery, and Fidelity worsened. The loan agreements between the two New York banks and East Coast provided that no funds obtained by said loans should be paid to Foresight except in exchange for accounts receivable from Foresight resulting from sales of its products. In the summer of 1972, officers of Fidelity learned that East Coast had been forwarding funds to Foresight for which no receivables were transferred. This was called "upstreaming".[16] The amount of money transferred to Foresight by this practice does not appear from the record.

It does appear that Foresight or East Coast, or both, applied to Fidelity and received from that company assistance in receiving additional credit during the summer of 1972. The loans were made to East Coast but Foresight was required to guarantee them. Several witnesses placed the amount around $400,000 and one witness[17] placed the amount at $409,116. The record is not clear as to what, if any, connection there was between the upsteaming practice and these additional 1972 loans. The two subjects seem to be intermingled in the testimony of the witnesses.

Five significant events occurred during the fall of 1972: on September 6th, September 18th, September 19th, September 21st, and November 1st.

There was considerable discussion about the solvency of Foresight on September 6th, the date of the first of them. The district court found that Foresight was insolvent on that date, and we concur in that finding.

At a meeting of the Board of Directors of Foresight on September 6, 1972, the following resolutions were adopted:

[16]See footnote 9, supra. There is some reason to believe that knowledge, or at least suspicion, of the upstreaming came to Fidelity's attention as early as February of 1972.

[17]Joseph M. Mizelle, liaison officer between Fidelity and Foresight and soon to replace Satell as president of Foresight.

"RESOLVED: That the Board of Directors of American Foresight, Inc. hereby directs the President of East Coast Associates, Inc. not to use East Coast funds for other than payment of interest on debt or East Coast operating expense except advances to American Foresight, Inc. approved by Mr. Mizelle.

"RESOLVED: That the Board of Directors of American Foresight, Inc. hereby directs the President of East Coast Associates, Inc. to assign its accounts receivable to Fidelity Corporation, or its designated affiliates, as collateral to secure indebtedness to Fidelity Corporation and its affiliates in connection with East Coast Associates' indebtedness."

Satell voted against the resolutions, Schiffrin abstained, and Beery was absent.

On September 18, 1972, Edward D. Simon, Vice-President of Foresight, executed in the name of that company a sale, assignment and transfer of all its accounts receivable to East Coast.[18] The evidence shows no resolution of the Board of

[18]The exact wording of said instrument is:

"For value received, AMERICAN FORESIGHT, INC. hereby sells, assigns, and transfers to EAST COAST ASSOCIATES, INC. the accounts, and all instruments evidencing same, set forth on Schedule A attached hereto and by this reference made a part hereof, and hereby certifies and guarantees that said undersigned has proper legal authority to make said sale, assignment, and transfer; that full delivery has been made of the property covered by said accounts and instruments; that the balances due thereon are net and not disputed by the account debtors, and that there are no set-offs or counterclaims whatsoever against payment thereof.

"The undersigned agrees that entries disclosing this absolute sale will be made immediately on the books of the undersigned.

"Dated this 18 day of Sept., 1972

AMERICAN FORESIGHT, INC.

By Edward D. Simon (signed)
Vice President

SCHEDULE A

"All rights to payment due on outstanding accounts or general intangibles evidenced by retail installment sale agreements arising out of solicitation sales of merchandise by American Foresight, Inc., its employees, agents, representatives, affiliates, or subsidiaries, made between June 1, 1967, and September 14, 1972, and designated as East Coast Associates, Inc., File Number 20 to 23599, inclusive."

Directors authorizing this assignment. The instrument was signed by the Vice-President, although Satell was still President.

It is stipulated that "[b]y instrument dated 19 September 1972, between East Coast Associates, Inc., assignor, Fidelity Bankers Life Insurance Company,[19] lender, and Fidelity Corporation, guarantor (collectively called 'assignee'), East Coast Associates assigned its accounts receivable to Fidelity Corporation and to Fidelity Bankers Life Insurance Company."[20] The designation of the accounts involved was identical to that covered by the September 18 assignment by Foresight to East Coast.[21] It is expressly evident that the

[19]Wholly owned by Fidelity. This is the corporation that made the $800,000 loan to East Coast later subordinated to those of the New York banks.

[20]The essence of the instrument is found in the first paragraph which provides as follows:

> "1. *Assignment of Instruments.* The Assignor hereby grants, for such period of time as its primary obligation on the aforesaid notes or any future notes or any other indebtedness to Assignee shall be unpaid, a security interest in, and assigns to Assignee as collateral security for the payment of the Assignor's liability to Lender, and Guarantor, and to save harmless Guarantor from any payment that might have to be made by reason of its endorsement as aforesaid, or to reimburse Guarantor for any such payment already made, all rights to payment due to Assignor upon the accounts, and instruments evidencing same, shown on Schedule A hereto annexed, all of its rights thereunder against any person or other entity from whom said accounts or instruments were acquired, all securities or guaranties held by Assignor in respect of such accounts and instruments, and all proceeds thereof. Assignor further agrees to transfer immediately upon signing this agreement to the agent designated by Assignee the original executed instruments evidencing said indebtedness."

[21]In both instruments reference is made to Schedule A which covers "outstanding accounts or general intangibles evidenced by retail installment sale agreements arising out of solicitation sales of merchandise by American Foresight, Inc. . . . made between June 1, 1969, and September 14, 1972, and designated as East Coast Associates, Inc., File Numbers 20 to 23599, inclusive."

purpose of this transaction was to secure Fidelity against loss on the $800,000 subordinated loan and against its liability as guarantor on the two $750,000 loans. No reference was made to the additional $409,116 lines of credit established in the summer of 1972.[22]

On September 21, 1972, another meeting of the Board of Directors of Foresight was held. At that meeting, Foresight's directors were advised that Fidelity would neither provide nor guarantee the money or credit necessary to enable Satell and Beery to continue operating Foresight. The meeting was continued to a future date to see if Satell and Beery could provide alternate plans for financing.[23]

After the September 21st meeting, Satell and Beery informed Regal Ware of the difficulty that had developed. That was Regal Ware's first knowledge that its account might not be paid in full. At that time Satell and Beery spoke of various possibilities for refinancing Foresight, including the possibility that Regal Ware might take over Foresight. Regal Ware was sufficiently interested to send a representative to investigate. However, it decided against acquiring Foresight, a part of the reason being that Regal Ware marketed its product

[22]See text at footnote 17, supra.

[23]The minutes of the meeting recite:

> "The former minutes of the meeting of September 6 were approved as circulated. The board then reviewed financial projections submitted by management and were advised that about $200,000 in cash was required to operate for the balance of 1972, and that about $400,000 in cash was necessary for 1973, but that in 1974 the company would have a positive cash flow. These projections were not agreed to by all present. The situation was reviewed and discussed, and management was then advised that Fidelity would not provide any additional funds or credit to the company. Management advised they had no alternative plans as to how to continue the operations under the circumstances. At this point it was agreed to recess the meeting until further notice so management could consider various courses of action that might be available to them."

By "management", reference was to Satell and Beery.

through various retail companies such as Foresight. The managers of Regal Ware considered that it would not be good policy for that company to compete with its customers. The first that Regal Ware knew for sure that it would not receive full payment was in late November 1972, when Fidelity offered to discharge all claims against Foresight by paying 20 percent. Regal Ware rejected that offer.

Regal Ware's claims against Foresight, which developed during the summer of 1972, were due in 90 days. The reason Regal Ware was not paid in the fall of 1972, after the accounts became due, was that after September 18th and 19th there was no money in Foresight with which to pay them. Satell testified that if Foresight had received cash from East Coast for all the accounts receivable which were transferred, it could have paid appellant.

The evidence is somewhat confused as to whether cash was then paid, or had been previously paid, by East Coast to Foresight for the accounts receivable which were assigned on September 18th. Mizelle, representing Fidelity, testified that cash was paid. However, Satell testified to the contrary. His version was that the assigned accounts were used to offset amounts which Foresight owed to East Coast because of the previous upstreaming.[24] The finding of the district court supports the conclusion that the assignment of September

[24]Incidentally, Satell contended that upstreaming was legitimate if not in excess of $800,000. The reason for that belief was that upstreaming was not forbidden in connection with the loan by Fidelity Bankers Life Insurance Company, but only in connection with the loans by the two New York banks. That view seems quite logical. If Foresight could obtain no funds until it had receivables to sell to East Coast, how could it operate at the outset? It must be that there was no objection to upstreaming funds obtained by East Coast from the $800,000 subordinated loan by Fidelity Bankers Life Insurance Company. In fact, Satell testified that the decision was left to him as to whether the $800,000 loan should be made to Foresight or East Coast. If Foresight could not have gotten any of the proceeds of the loan before sales were made, it is logical the loan would have been taken in the name of that company.

18th was applied against debts by Foresight to East Coast and that cash was not paid for that assignment. The evidence does show that East Coast continued to buy accounts receivable from Foresight after the September 18th and 19th assignments, and that such sales were paid for in cash.[25] However, the September 6th resolution by the Foresight Board of Directors forbade East Coast payments to Foresight unless "approved in writing by Mr. Mizelle." We conclude that only payments to be used for current operating expenses, particularly the compensations for the student salesmen, were approved, and not transfers of funds to be used to pay creditors, such as Regal Ware.

On November 1, 1972, the Board of Directors of Foresight adopted the following resolution:

> "RESOLVED: That the proper officers are hereby authorized, empowered, and directed to do all things necessary and requisite to wind up and settle the affairs of the Company, to collect the outstanding debts and to provide for the payment of the obligations of the Company."

Satell and Beery voted against the resolution and then immediately left the meeting. At that same meeting, the following action was taken with the written consent of Drum International, Inc., the sole stockholder:[26]

> "RESOLVED: That Edward M. Satell and William C. Beery be, and they hereby are, removed as Directors of the Company, effective on this date."

That same day, Satell was replaced by Richard J. Maccarone[27] as President, and Beery was replaced by Joseph M. Mizelle as

[25]Payment was made by what was called "wire transfers" of funds from East Coast's bank to Foresight's bank. $123,891.82 was so transferred during September of 1972 and $127,115.73 during October.

[26]This was done pursuant to the authority of Va. Code §13.1-28 of the Virginia Stock Corporation Act.

[27]Maccarone was already president of East Coast. That same day (November 1, 1972), Satell and Beery were removed as directors of East Coast.

Chairman of the Board. February 23, 1973, Maccarone resigned as President and was replaced by Mizelle. Mizelle was obviously the principal officer of Foresight and was charged with the responsibility of liquidating that company.

At the time of the trial of this case in the district court, the liquidation of Foresight was still in process. The two New York banks had been largely paid. The $800,000 subordinated loan had not yet been paid. The student salesmen had been paid. Many of the creditors had been paid at the rate of 20 percent (at oral argument we were told that most of them had been). About $59,000 worth of goods left on hand was given to various charities, and Mizelle testified that this action was taken only after attempts at sale had failed.

A consolidated balance sheet, dated October 30, 1972, and a balance sheet for East Coast, dated October 31, 1972, are in evidence as exhibits. The East Coast balance sheet shows a cash asset of $241,331. There is no evidence as to the origin of this item or its disposition. Since Fidelity was in charge of the liquidation of the two companies, and since all of the directors and officers of both companies (largely the same) are Fidelity officers or employees, it may only be presumed that this asset was taken by Fidelity.[28]

Shortly after November 1, 1972, Satell and Beery filed separate suits in a state court of Pennsylvania against Foresight, based upon the theory that Foresight had breached its contracts of employment with them. These suits were settled by Fidelity, and the obligations of Satell and Beery which were assigned to Fidelity as the dividend of April 3,

[28]See text at part VIII, infra, for our interpretation of the legal significance of this seizure.

1972 were canceled as a part of the settlement. Also, Fidelity made other financial adjustments with Satell and Beery.[29]

IV

The district court's decision rejecting appellant's claim against Fidelity seems to be based upon four holdings. (1) Fidelity did not guarantee Regal Ware's account with Foresight. (2) Fidelity in no way led Regal Ware to believe that it would be liable for Foresight's debts. (3) Although Fidelity controlled all the stock in both Foresight and East Coast, and at the end determined the policies of both corporations, those facts do not make it, a stockholder, liable for the debts of its subsidiaries. (4) If there were a preference (and the court expressly did not make any finding on that point), plaintiff was not legally harmed by it. The reason for this last point was that Regal Ware is a creditor of Foresight, but the preference, if any, was to creditors of East Coast, with assets of East Coast, against which Regal Ware had no claim.

Because we do not concur in the fourth basis of the decision of the district court, we express no opinion on the first three bases for its judgment and vacate the judgment dismissing Regal Ware's case against Fidelity.

The district court and Fidelity cite *Terry v. Yancey*, 344 F.2d 789 (4th Cir. 1965), *Mas v. NuGrape Co. of America*, 62 F.2d 113 (4th Cir. 1932), *Brown v. Margrande Compania Naviera*, 281 F. Supp. 1004, 1006 (E.D. Va. 1968), and *Beale v. Kappa Alpha Order*, 192 Va. 382, 64 S.E.2d 789 (1951),

[29]See footnote 4 and text at footnote 16. Actually, six suits, three against Fidelity and two against Foresight by Satell and Beery, and one by Fidelity against Satell and Beery, were settled. The agreement also included "any other existing obligation." The agreement included the clause "any reference to Fidelity shall be deemed to include any of its subsidiaries."

for the proposition that stock ownership does not make a corporate stockholder liable for the debts of the corporation whose stock it owns. This is the well known and generally accepted corporate fiction. We do not hold Fidelity liable for the debts of Foresight to Regal Ware because it controlled that company through its stock ownership and presently have no occasion to pierce the corporate veil between Fidelity and Foresight or Fidelity and East Coast. Our holding of liability is based upon our conclusion that Fidelity used its control of Foresight and East Coast to divert assets of Foresight which should have been used for creditors of that company, such as Regal Ware.

A more interesting problem is presented as to whether the corporate distinctiveness of Foresight and East Coast should be regarded or whether they should be considered as a single business enterprise. There are considerations both ways. They had almost identical directors. Also, their managements were the same until March of 1972. From that time on, Maccarone became the chief executive officer of East Coast while Satell and Beery continued to manage Foresight, although Fidelity directors came into control of that company. Those two companies usually prepared consolidated balance sheets. We need not decide this question, however, because we reach the same conclusion under either hypothesis.

V

If Foresight and East Coast be regarded as one enterprise, it is clear that Fidelity used its stock control to give preference to creditors whose debts it had guaranteed. The district court has held that Foresight was insolvent by September 1972, and thereafter, and we concur in that decision. Foresight and East Coast combined were also insolvent.

Fidelity argues that, absent bankruptcy, it is not legally objectionable for an insolvent debtor to prefer some creditors over others, relying on *Surratt v. Eskridge*, 131 Va. 325, 108

S.E. 677 (1921), and *Hutcheson v. Savings Bank of Richmond*, 129 Va. 281, 105 S.E. 677 (1921). From that proposition, it concludes that even if Foresight and East Coast be regarded as a single debtor, they could legitimately pay the debts to the New York banks even though, by doing so, the assets available to other creditors were lessened.

Neither of the cases control here. They do not involve the situation in which a parent corporation, which is also a creditor of an insolvent corporation, uses its stock control to give itself a preference as a creditor. That such cannot be done is clearly held in *Certain-Teed Products Corporation v. Wallinger*, 89 F.2d 427 (4th Cir. 1937) (Virginia law), and *Darden v. Lee Company*, 204 Va. 108, 129 S.E.2d 879 (1963). In *Certain-Teed*, this court stated on page 434:

> "Certain-Teed invokes the rule that the mere fact that the voting stock of one corporation is owned by another, and that the two have the same officers and directors, does not make the holding company liable for the debts or engagements of the other or create the relation of principal and agent between them. On the other hand, the receiver cites authorities for the familiar statement that when such stock ownership and control are resorted to not for the purpose of participating in the affairs of the subsidiary corporation in a manner normal and usual with stockholders, but for the purpose of making it a mere agent or instrumentality or department of the holding company, the courts will look through the form of the situation and deal with it as the justice of the case may require. . . ."

Again, on page 435, this court stated:

> ". . . It is no answer to say that in Virginia, a preferential transfer by an insolvent corporation to a stockholder has been held permissible in such cases as . . . [cases cited] for these cases do not go so far as to authorize a preference which has been obtained by a creditor in complete control of the affairs of a corporate debtor. The rule generally prevailing under such circumstances is to the contrary. . . ."

Darden followed *Certain-Teed* which it cited with approval. For the same principle, see also the following decisions: *Freeman v. Swink*, 261 F.2d 84 (4th Cir. 1958), and *Davis v. Woolf*, 147 F.2d 629 (4th Cir. 1945). Here, Fidelity directed the September 19th assignment of the accounts receivable to a creditor (Fidelity Bankers Life Insurance Company) and itself for, at least, the purpose of preferring other creditors whose claims it had guaranteed. Fidelity therefore depleted the assets of Foresight and East Coast in order to protect itself from liability on its guarantee to the two New York banks and in order to prefer the wholly owned subsidiary (Fidelity Bankers Life Insurance Company) to general unsecured creditors such as Regal Ware.

VI

If the corporate veil be respected and Foresight and East Coast be regarded as separate corporations, still Fidelity used its corporate control to deplete the assets of Foresight which should have been left available for all creditors. This act of depletion occurred in three respects: (1) by the assignments of September 18th and 19th, (2) by taking possession of the $241,331 of cash in the possession of East Coast on October 31, 1972, and (3) by the gratuitous distribution of surplus property to charitable organizations. We will later discuss the April dividend.

VII

On September 18, 1972, Foresight, under the control of Fidelity directors, caused all accounts receivable to be assigned to East Coast. The next day, on September 19th, East Coast, also under control of Fidelity directors, caused those same accounts receivable to be assigned, as security, to Fidelity and to Fidelity Bankers Life Insurance Company.

Regal Ware was a creditor of Foresight but not of East Coast. Therefore, only the assignment of September 18th depleted the assets to which Regal Ware was entitled.

Fidelity seems to run together two arguments regarding the September 18th assignment. First, it is argued that title to the receivables passed when they were delivered and that the formal assignment was merely a *nunc pro tunc* act to formally recognize a *fait accompli*. Fidelity cites *Coffman v. Liggett*, 107 Va. 418, 59 S.E. 392 (1907), *Lone Star Cement Corp. v. Swartout*, 93 F.2d 767 (4th Cir. 1938), and *Stevan v. Union Trust Company of the District of Columbia*, 316 F.2d 687 (D.C. Cir. 1963), for the proposition that an oral assignment, with delivery of the paper, was sufficient to accomplish an assignment of the receivables. Since the assignment covered East Coast file numbers 20 to 23599, from June 1, 1969 to September 14, 1972, it is probable that many of the receivables covered by the September 18th assignment had already been delivered to East Coast the argument goes.

Second, Fidelity also contends that actual cash consideration was paid by East Coast to Foresight for all of the receivables transferred. This is the crucial problem, because, even if the transfers were formally valid without the September 18th document, the resources of Foresight were depleted unless consideration was paid for all of the assignments. Fidelity oriented witnesses testified that consideration was paid. Satell, however, testified to the contrary. He acknowledged that upstreaming had occurred and contended that some of the accounts assigned on September 18th were to offset money formerly received from East Coast by Foresight for which no accounts had been transferred. The district court apparently accepted that view, and we concur.[30]

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[30]See footnote 24, supra. Guilford, Executive Vice-President of Fidelity, testified that the Foresight accounts were assigned "... to protect the creditors of East Coast, which included ours, unquestionably."

When the upstreaming occurred, Foresight became indebted to East Coast. When, on September 18, 1972, Foresight, at the direction of Fidelity, assigned accounts receivable to East Coast without receiving any new consideration, Foresight granted a preference to that creditor and thus depleted the assets available for other creditors.

There is another, and independent, reason why Fidelity depleted the assets of Foresight otherwise available for creditors. Reference is made to the September 19th assignment by East Coast to Fidelity and Fidelity Bankers Life Insurance Company. Fidelity was not a creditor of East Coast but a stockholder of a stockholder (Drum International) of a stockholder (Foresight) of East Coast. Payment to Fidelity, therefore, cannot be supported on the theory of payment of a debt. It is true that Fidelity Bankers Life Insurance Company was a creditor of East Coast. But the evidence was that the receivables assigned on September 19th were not used to reduce East Coast's $800,000 debt to that company. Nor could they have been so used because that debt had been subordinated to the debts to the two New York banks. Fidelity took the receivables assigned on November 19th and used them to eventually pay the two New York banks. Even if East Coast could have directly paid the two New York banks, it could not pay a stockholder three times removed. Unless East Coast did use the receivables to pay its creditor, it should have turned the assets over to its immediate stockholder, Foresight, to be used for the benefit of its creditors, such as Regal Ware.

It may be argued that this line of reasoning is formalistic and that East Coast was merely doing indirectly what it could have done directly. In that connection, it must be remembered that this line of reasoning is predicated upon an alternative to piercing the corporate veil. The corporate fiction, itself, especially as applied between Foresight and East Coast, is dryly technical in nature and of questionable application at the best. Since Fidelity seeks separate treatment

of the corporations for the purpose of preserving the corporation fiction, it is not unjust to require it so to do in the distribution of assets, and this is more true when such distribution admittedly preferred itself to the detriment of creditors.

VIII

The balance sheet of East Coast, dated October 31, 1972, shows a cash asset of $241,331. The only reasonable inference to be drawn from the evidence is that this asset was seized by Fidelity.[31] But, as explained, Fidelity was not a creditor of East Coast. There is no evidence that this item was used for the benefit of any of East Coast's creditors. This cash item should have been forwarded to the sole stockholder of East Coast, Foresight, for the benefit of its creditors.

IX

On April 3, 1972, the Fidelity dominated board of directors of Foresight declared a dividend of $53,942, which consisted of the obligations of Satell and Beery to Foresight.[32]

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[31] See text at footnote 28, supra.

[32] See part II of the opinion.

It is claimed that the action violated §13.1-43 of the Code of Virginia[33] because it is alleged the corporation was insolvent at the time, and there was neither earned nor capital surplus.[34] Fidelity now argues that the $53,942 dividend was not in fact a dividend but merely a taking of Foresight's property.

Whether the matter be considered a dividend, or whether it be considered a taking, to determine whether or not it may be set aside by Regal Ware requires findings of fact which were either not made or which we think we should not make upon the state of this record.

The district court did not address the issue of whether or not Fidelity was insolvent on April 3rd. While it seems unlikely that it would or should find that the good will of the company would have any more value on April 3rd than it had in September, when good will was found to be practically valueless, it must be remembered that Foresight in fact operated until the fall and indeed ran up its Regal Ware account sued upon during the intervening period. It is

[33] §13.1-43 provides in pertinent part:

"*Dividends.* – The board of directors of a corporation may, from time to time, declare and the corporation may pay dividends on its shares in cash, property or its own shares, *except when the corporation is insolvent or when the payment thereof would render the corporation insolvent* or when the declaration or payment thereof would be contrary to any restrictions contained in the articles of incorporation, subject to the following provisions:

(a) Dividends in cash or property may be declared and paid, except as otherwise provided in this section, only out of the unreserved and unrestricted earned surplus of the corporation or out of capital surplus, howsoever arising, but each dividend paid out of the capital surplus shall be identified as a distribution of capital surplus and the amount per share paid from such surplus shall be disclosed to the stockholders receiving the same concurrently with the distribution."

. . . (Emphasis supplied).

[34] The statute does indicate that dividends may be paid out of capital surplus if the stockholders are notified.

necessary to ascertain the question of the solvency of Foresight on April 3rd in order to determine whether §13.1-43 of the Virginia Code was violated by a payment of a dividend while insolvent.[35]

If, as Fidelity now argues, the transfer of the Satell and Beery account to Fidelity was merely a taking of the property, the question of insolvency is also of consequence in considering whether or not the conveyance might be set aside under Virginia Code of 1950 §§55-80 or 55-81, and the cases construing those sections, or under general law.

It is also apparent that since the debt of Regal Ware arose after the April 3rd dividend, it probably could not set aside the taking as a voluntary conveyance under §55-81, although it might as a fraudulent conveyance under §55-80. *Consolidated Tramway Co. v. Germania Bank*, 121 Va. 331, 93 S.E. 572 (1917). Furthermore, the parties have not addressed themselves to the issue, and we do not, as to whether or not a creditor not existing at the time of the dividend, if it be considered a dividend, has standing to seek to have the same set aside as a matter of Virginia law. We also do not address the question as to whether or not the April 3rd transfer was from surplus, either capital or earned.

Because factual findings should be made upon which to base a decision as to whether or not the transfer of the Satell and Beery accounts to Fidelity should be set aside, as well as further conclusions of law, we remand this entire question to the district court for further fact finding and action not inconsistent with this opinion if necessary.

X

In the final liquidation, around $59,000 worth of unsold goods belonging to Foresight were distributed by Fidelity to

[35] No question is raised that the payment made Foresight insolvent, and we express no opinion on that matter.

charitable organizations. Joseph M. Mizelle, Fidelity's officer in charge of the liquidation process, testified that these gifts were made only after attempts to sell these goods had proven unsuccessful. However, there is no showing that efforts at disposition were sufficient to indicate a complete lack of market value. Fidelity did not disclaim the possibility of itself using these charitable contributions as income tax deductions.[36] We hold that Fidelity is not liable to the creditors of Foresight for the book value of the goods given to charity, but only for the market value thereof at the time the gifts were made.

XI

We hold that Regal Ware is entitled to a judgment against Fidelity in the amount of $210,571.96 with interest as provided in the judgment of the district court against Foresight, but with the condition that the judgment may not be satisfied other than from the ascertained value of the assets of Foresight wrongfully diverted by Fidelity, that is to say, the accounts assigned, and cash asset of $241,331, and the property given to charity. We think the value of such assets is far in excess of the amount of the judgment and that no further proceedings on this account will be required in the district court. But, if Fidelity denies that the total value of such assets exceeds the amount of the judgment, then the district court should ascertain the fair market value of the accounts receivable assigned at the time of their assignment, and the fair market value of the property given to charity at the time of the gift. Of course, the value of the $241,331 cash asset seized by Fidelity from East Coast is fixed. If the total fair market value of these items does not exceed the

[36] When questioned on the subject, Fidelity officials testifed that, because of loss resulting from other litigation, wholly unconnected with this case, Fidelity would probably have no taxable income, and thus the question of use of these charitable donations as deductions may be moot.

amount of the judgment, then the court should consider whether the April 3rd dividend, or taking, however it may be called, should be set aside. The amount of that dividend, of course, is fixed. If the first three items equal or exceed the judgment, then the district court need take no action with respect to the April 3rd dividend, but simply enter judgment against Fidelity in like amount and form as it did against Foresight. If the first three items do not equal or exceed the judgment, then the court should ascertain if the April 3rd dividend should be set aside, and, if so, it, in addition to the other three items, equals or exceeds the judgment, the court should similarly enter judgment against Fidelity. If the total of all four items does not equal or exceed the judgment, then the district court should reduce the judgment to the value of the assets wrongfully diverted by Fidelity and enter judgment against Fidelity in that amount with interest from the same date the judgment against Foresight bears interest.

Late in the case, Regal Ware attempted to amend its complaint into a creditor's bill, which was refused by the district court. We hold that the district court did not abuse its discretion in refusing to allow Regal Ware to so amend the complaint at that late date.

We note, however, that Regal Ware and Fidelity do acknowledge the existence of other unsatisfied creditors of Foresight and also the existence of a creditors' suit pending in the Virginia courts. A copy of the complaint in the State court has been filed with us, along with a motion that we enjoin the prosecution of the creditors' action by Regal Ware in the Virginia court pending the outcome of the case here. The issues in our case are among those properly before the State court. In addition, the State court may find the decision here to be *res judicata* or that the parties are within allied estoppel doctrines. Regal Ware, by its motion to convert this case into a creditors' suit, and by bringing the creditors' suit in the State court along with another creditor, has sufficiently indicated its willingness that any recovery here be subject to the outcome of a proper creditors' suit. Accordingly, on

remand, the district court will direct that the satisfaction of the judgment in this case be paid not to Regal Ware, but into the district court which will make the monies available to the Virginia court in which the creditors' suit is pending should that court indicate a willingness to dispose of the proceeds of the judgment here in that case. If the State court declines to so dispose of the proceeds of the judgment in this case, then the district court will dispose of the said sum to those creditors of Foresight who may lawfully be entitled thereto had this suit been conducted as a creditors' suit. It follows that no injunction pending this appeal will issue for the reasons apparent from our discussion above, as well as because there are other creditors in the State court who are not parties to this case and over whom we have no jurisdiction to prevent their proceeding in the State court even were we so disposed.

XII

We have considered the other contentions of Fidelity and are of opinion they are without merit.

We do not address the question of whether Fidelity should receive credit for liquidation expenses of Foresight because, as against Regal Ware, we do not think it should.

VACATED AND REMANDED
WITH DIRECTIONS.

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-1623

FIDELITY CORPORATION,
Petitioner,

v.

REGAL WARE, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW

This was a diversity action instituted in the United States District Court for the Eastern District of Virginia, at Richmond by respondent, Regal Ware, Inc., a Wisconsin corporation, against Fidelity Corporation and its wholly owned subsidiary, American Foresight, Inc., both Virginia corporations, for an indebtedness of $210,571.96.

The case was tried to the court without a jury. The court entered judgment on August 20, 1974, in favor of Regal Ware, Inc. against American Foresight, Inc. for $210,571.96, with interest from July 3, 1973, and against

Regal Ware in favor of Fidelity Corporation .

Regal Ware, Inc. served and filed Motion for New Trial and to Alter and Amend Judgment in favor of Fidelity Corporation on August 27, 1974. The District Judge entered order denying the motion on November 8, 1974. (Exhibit A).

Notice of Appeal was filed on December 4, 1974. (Exhibit C with Petition, p. 14).

The defendant, American Foresight, did not appeal. That judgment is therefore final.

On July 1, 1975, petitioner filed Motion to Dismiss in the Court of Appeals on the ground that the notice of appeal was not filed within thirty days from the date of the judgment appealed from, and stated no grounds whatsoever. Respondent answered within the time required by Rule 27(a), Rules of Appellate Procedure. On August 6, 1975, twenty-three days later, petitioner filed its initial brief or memorandum in support of its motion. Under date of August 8, 1975 the Fourth Circuit entered order denying motion to dismiss, but granting leave to petitioner to renew its motion at the time of oral argument and to brief the question if they be so advised, which they did.

Fidelity had sought an injunction in the Fourth Circuit and in the District Court to restrain respondent and other creditors of American Foresight from proceeding in a general creditors' suit pending in the state court at Richmond. In its opinion of January 11, 1977 the Fourth Circuit denied the motion for injunction, and concluded its opinion, "We have considered the other contentions of Fidelity and are of the opinion they are without merit". (This relates to Fidelity's motion to dismiss the appeal). (Opinion, pages 47-48).

By opinion dated January 11, 1977, the Court of

Appeals for the Fourth Circuit reversed the judgment in favor of Fidelity Corporation and remanded with instructions to the District Court to enter judgment against Fidelity Corporation in the same amount as the judgment against American Foresight, Inc., "but with the condition that the judgment may not be satisfied other than from the ascertained value of the assets of Foresight wrongfully diverted by Fidelity, that is to say, the accounts assigned ($2,200,000.00), and cash asset of $241,331.00 and the property given to charity."

There was the further provision that the proceeds be paid into the District Court "which will make the monies available to the Virginia court in which the creditors' suit is pending".

Fidelity filed petition for a rehearing in the Court of Appeals, which was denied on February 23, 1977. (Exhibit D, p. 15, Petition for Writ of Certiorari).

Thereafter petitioner moved that the mandate be stayed, which motion was denied on April 7, 1977.

Petitioner petitioned this Court to stay the mandate, which was denied by the Chief Justice on April 21, 1977.

B. QUESTION PRESENTED FOR REVIEW

The question fo. review as posed by petitioner omits the essential detail that respondent filed its Notice of Appeal within thirty days after the district judge had entered order denying its Motion for New Trial and to Alter and Amend, thereby complying with Rule 4(a), Federal Rules of Civil Procedure. (Rule quoted in Petition at p. 4).

C. FACTUAL SITUATION

For the reason that the facts stated in the Petition for Writ of Certiorari omit and understate salient details

essential to a proper understanding of the true situation existing which led the Fourth Circuit to deny motion to dismiss the appeal on three separate occasions, respondent will outline briefly what it considers to be the pertinent facts.

After the Court, without a jury, had heard evidence on Thursday, Friday and Monday morning, August 15th, 16th and 19th, 1974, the case was argued on Monday the 19th, before the luncheon recess. (Exhibit B, Tr. 510). The Court reporter was excused prior to argument. At the conclusion of argument the district judge announced that he would prepare his findings of fact and conclusions of law and dictate them to the court reporter later that afternoon. He then stated that it would not be necessary for counsel to be present, that a copy of his findings would be forwarded to all counsel by the court reporter.

Thereupon counsel for respondent Regal Ware, Inc. returned to his office at Norfolk.

On the morning of August 20, 1974, counsel for respondent had requested that respondent Regal Ware be permitted to amend its action into a general creditors' suit. This is shown in a two-page supplement to the trial transcript, entitled "Partial Proceedings". "Partial Proceedings", a two-page transcript of the proceedings of the morning of August 20th, was first seen by counsel for respondent when filed by counsel for petitioner as an exhibit with its memorandum in support of its Motion to Dismiss in the Court of Appeals, on August 6, 1975. The following is taken from this supplement:

> "THE COURT: About ten minutes ago Mr. Steingold called, I think from Norfolk, and I spoke to him because my secretary couldn't seem to fully understand what his problem was. But what it was, in effect he wished to file an amendment to his complaint, the style, I gather, to be Regal Ware, Incorporated on behalf of itself and all creditors. In any event, I told him that I would not delay my findings, that he should take it up with Mr. Allen, and if you had no objections, I was perfectly willing to permit the amendment.
>
> "Now, first I will ask you, has he been able to get you. I doubt if he has.
>
> "MR. ALLEN: He may have tried. I was not in the office.
>
> "THE COURT: So you have not talked to him?
>
> "MR. ALLEN: No, sir.
>
> "THE COURT: I did tell him that unless you acquiesced, he could make such motion as he wished, either of you could, after I have given my findings of fact, and if the entry of the judgment which I am about to enter in any way interferes with the motion, should it be well taken, I will set the judgment aside for that purpose. But I told him I felt you ought to be heard, and vice versa; if you have any, I want him to be heard."

On August 21, 1974, counsel for respondent received copy of judgment entered by the Clerk on August 20, 1974. (Exhibit C).

By reason of being present before the District Judge in connection with a pre-trial hearing in Civil Action 170-73-R, on August 22, 1974, Jeffrey M. Steingold, counsel's son and Richmond partner, attempted to obtain a copy of the findings from the court reporter. The reporter's office, which was then opposite Judge Merhige's office, was locked. Upon inquiring at the district court Clerk's office, on the same floor, he was advised that the reporter

had gone out of town, on vacation. (Exhibit D — Affidavit filed in Court of Appeals).

Becoming apprehensive because of the delay, counsel telephoned the district judge at Richmond from his office at Norfolk on August 27, 1974, explaining the complication developing in not being able to obtain a transcript of his findings in order that he might comply with Rules 59(e) and 7(b)(1) of the Federal Rules of Civil Procedure.

The judge suggested that counsel file motion to alter and amend and reserve the right to assign specific grounds when copy of the court's findings were made available. *This suggestion was complied with that day.* The filing of the motion in this form is the sole basis for petitioner's request for certiorari.

On September 3, 1974, upon learning that the court reporter had returned to his office, respondent's counsel then went to Richmond from his office at Norfolk to attempt to obtain a copy of the findings, the reporter having refused to furnish a copy to counsel's Richmond partner or permit him to see a copy for the reason that the findings "had not been edited" by the district judge. The reporter then refused to permit respondent's senior counsel to see a copy, stating that he had prepared the findings in rough and that they had not been approved by the judge. Judge Merhige was not available, then sitting in Boston.

Counsel thereupon approached the judge's secretary, whose office was across the hall from that of the reporter, with the request that he be permitted to see a copy of the draft of the findings with the understanding that it was a "rough draft", subject to correction. She appeared reluctant, but upon being advised of the urgency, went into the judge's chambers and returned, stating she could not find it.

Counsel had served a copy of his Motion for New Trial on counsel for petitioner at the time it was mailed to the Clerk of the District Court. *No objection was then raised to it or to its form at that time or at any other time until July 1, 1975,* at which time the Motion to Dismiss was filed with the Fourth Circuit. *At that time the court reporter's expense of approximately $1,000 had been incurred, respondent's opening brief was prepared or already filed with the Court of Appeals, and a very exhaustive Appendix had been prepared for filing or had been filed.*

On September 6, 1974, in order to be able to prepare a memorandum in support of his motion as required by local rules of court,[1] counsel wrote Judge Merhige, with copy to opposing counsel, calling his attention to the need for copy of his findings, which still remained unavailable. *He reminded the judge that he had followed his suggestion in reserving the grounds until receipt of the findings. No reply was received.* (Exhibit E).

This was followed by another letter to the district judge on September 20, 1974, pleading for copy of his findings *and again repeated the judge's authorization to supply detailed grounds upon receipt of copy of his findings.* Then, on September 27, 1974, as indicated by rubber stamp at bottom right hand corner of respondent's original copy, counsel received the original of his letter of September 20th to Judge Merhige, with the judge's notation at the bottom stating that the findings had been filed "several weeks ago". (Exhibit F p. 10a herein), Counsel for respondent then called the

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[1]Rule 11(F) "Briefs Required: All motions, unless otherwise directed by the Court . . . shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons . . ."

Clerk's office and found that the findings had been filed September 9, 1974. They were 14 pages in length.

At no time during this one-way correspondence did the district judge disaffirm or question counsel's reference to his authorization to word the motion as filed.

Counsel for respondent Regal Ware accidently learned on December 4, 1974, by means of an allegation in petitioner Fidelity's Cross-Bill seeking $250,000 damages for joining it as a defendent in the general creditors' suit pending in Richmond Circuit Court, that the district judge had denied its Motion to Alter and Amend by order entered November 8, 1974. Otherwise, the notice of appeal would have been filed late and counsel would have found it necessary to seek an order to permit late filing for excusable neglect under Rule 60(b) (1), Federal Rules of Civil Procedure.

Counsel for Fidelity was urging respondent to seek a date for hearing the motion as late as October 14, 1974 without any suggestion that it was improper. (Exhibit I herewith).

ARGUMENT

I.

THE QUESTION PRESENTED FOR REVIEW

The question as posed uses the catch-phrase "where the notice of appeal is filed 107 days after the date of entry of judgment by the District Court . . ."

This is a half-truth, omitting the fact that respondent filed Motion for New Trial and to Alter or Amend Judgment within ten days of entry of judgment as required by Rule 59(e), Federal Rules of Civil Procedure. (Quoted at page 3 of the petition for certiorari).

Petitioner alleges that the contents of the motion are

not in *strict* compliance with Rule 7(b)(1) of the Federal Rules of Civil Procedure.

Petitioner further omits, in the question as presented, that the District Judge ruled on the motion to alter and amend by order entered November 8, 1974, denying the motion, and that the Notice of Appeal was filed within 30 days thereafter as required by Rule 4(a), Federal Rules of Appellate Procedure. (Rule quoted at page 4 of the petition for certiorari).

It is therefore apparent that the true question for review does not concern a notice of appeal filed 107 days after entry of judgment, *but whether an allegedly defective motion timely filed is a nullity.* The rule seems to be to the contrary. *Yanow v. Weyerhouser Steamship Company* (CA 9 1959) 274 F2d 274, 282, 283. In a comprehensive opinion the Ninth Circuit, citing authorities, held "that in order to suspend the running of the 30-day appeal period allowed by Rule 73(a) a motion for new trial need not be granted or even be grantable. *Thomas Day Co. v. Doble Laboratories,* 9 Cir., 41 F2d 51, 52; *The Astorian,* supra." (At page 283).

While petitioner has cited two cases each from the Second, Third, Fifth, Seventh, Eight, Ninth and Tenth Circuits, allegedly in support of the proposition "that timely filing of notice of appeal is a prerequisite to appellate jurisdiction", a careful analysis of each of the cases cited indicates no conflict with the decision of the Fourth Circuit in this case.

Sterling v. Chemical Bank, CA 2, 511 F2d 1030, may be read to support respondent's position here, although it is not in point. Notice of appeal was filed after 30 days of judgment. It was remanded to determine whether there was excusable neglect.

Boggs v. Dravo, (CA3), 532 F2d 897, involved a

motion to alter and amend, as did *Torockio v. Chamberlaine Mfg. Corp.* (CA3, 1972) (in banc), 456 F2d 1084, 1085. The Third Circuit refused to follow restrictive interpretation, holding that appeal was timely filed.

Rothman v. United States (CA3, 1975) 508 F2d 648, was strictly a question of whether notice of appeal was filed in time. Remanded to determine whether Rothman did "all that could be reasonably be expected to get the letter" to the Clerk's office on or before January 7. May be cited in favor of respondent's position here.

Lashley v. Ford Motor Company (CA5) 518 F2d 749. The notice of appeal was filed late. By a *per curiam* opinion the Fifth Circuit remanded "for a determination of whether there was excusable neglect."

The Seventh Circuit cases involve excusable neglect. Cited in support was *Reed v. People of Michigan* (CA6, 1968) 398 F2d 800, where it was held that "excusable neglect was apparent in the record."

The effect of the Ninth Circuit case was changed by amendment to Rule 4(a), FRAP *(U.S. v. Molitor)* which amendment extended time for notice of appeal by any other party for 14 days after the date on which the first notice of appeal was filed. This was to avoid cutting off other parties' right to appeal when the first appeal was filed at the last moment.

The other cases cited do not even remotely decide the question here involved.

II.

REASONS FOR GRANTING THE WRIT

1. *The first reason stated in order to comply with Rule 19(b) of this Court is that the decision by the Fourth Circuit in this case conflicts with decisions of other courts*

of appeal on the same matter.

As stated, the cases cited by petitioner just do not bear this out.

Actually, the text writers, particularly Moore on Federal Procedure, at volume 9 at page 961, in note 3, in discussing the Fourth Circuit case of *Witt v. Merrill*, (CA4, 1953), 208 F2d 285, concludes:

> "On the precise facts, the result seems sound in the light of the subsequent ruling of the Supreme Court in *Thompson v. Immigration and Naturalization Service* (1964) 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed. 2d 404, 7 FR Serv 2d 73a. 62, Case 3"

> "In *Thompson*, supra, the Supreme Court said:

> "For if any question had been raised about the timeliness of the motions at this juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of entry of the judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions."

On its facts *Witt*, supra, is directly in point here in respondent's favor, and *Thompson* is of the highest authority. In effect, petitioner asks this Court to reverse *Thompson* as well as *Wolfsohn, Executrix v. Hankin* (1964) 376 US 203, 84 S.Ct. 699 11 L.Ed. 636, which cited and followed *Thompson*. See *Motteler v. J.A. Jones, etc. Co.* (CA7, 1971), 447 F2d 954, 955.

2. *The second ground stated is that the decision conflicts with the decisions of the Supreme Court of the United States.*

On the contrary, this decision follows *Thompson v. Immigration and Naturalization Service*, supra and *Wolfsohn, Executrix, v. Hankin*, supra. The factual

situation in both parallels that of the case at bar. It would be difficult to distinguish either fact or principle between these cases.

In *Parissi v. Telechron, Inc.*, 349 US 46, 47, 75 S.Ct. 577, 99 Led 678, this Court expressly disapproved the decision of the Ninth Circuit where it had applied a strict interpretation of federal rules in *Mondakota Gas v. Montana Dakota Utilities Co.*, (CA9) 194 F2d 705, 706. Petitioner would have this Court withdraw its disapproval of *Mondakota Gas*, supra.

No case reasonably in point decided by this Court has been cited in conflict with the case at bar.

III.

THE MOTION WAS TIMELY FILED

Petitioner here seeks reversal of a substantial judgment against it on the merits by alleging a procedural error, which position is without substance. This Court has twice ruled against petitioner's contention, and cases directly in point have been decided against petitioner's contentions, as will be shown.

At 9 Moore's Civil Procedure 960, in discussing Rule 7(b) of the Federal Rules of Civil Procedure, which requires that a motion shall "state with particularity the grounds therefor", Moore states in note 1 on that page:

> "It was held in *Marshall's U.S. Auto Supply v. Cashman* (CA10, 1940) cert denied (1940), that the district court lacked power to grant a new trial in response to a motion which stated grounds in general terms only. This result is termed 'undesirable'

> in the Committee Note accompanying the 1966 amendment of Rule 59(d), and the amendment authorizes the district court to grant a new trial for reasons not stated in the otherwise timely motion therefor, and presumably, in response to such a general assignment of grounds as that offered in *Marshall's U.S. Auto Supply.*"

This amendment invalidates a line of cases previously adhering to the strict rule. Petitioner urges this Court to adopt an iron-clad, inflexible rule to meet every conceivable situation which may arise. This is obviously impossible. As the various decisions show, great injustice would follow where litigants and their counsel were not remotely at fault in not being able to state in detail grounds for a motion under circumstances such as here, in the initial motion and within the initial ten-day period.

Even had counsel been present when the district judge recited his combined findings of fact and conclusions of law, extending to 14 typed pages, involving involved facts and principles, it still would have been necessary to have the transcribed findings to state in detail the grounds for the motion.

In *Motteler*, supra, the Court, referring to *Wolfsohn v. Hankin*, supra, said:

> "There the district court had entered an order extending the time within which the appellant could move for rehearing under Rule 59. In reliance on this extension of time, the appellant did not file his motion for rehearing within ten days and did not file his notice of appeal until after his motion for rehearing was denied, several months after the original judgment entry. The Supreme Court summarily reversed the court of appeals on the authority of *Thompson*, supra."

Traditionally the ground for motion for a new trial or to alter and amend has been the general statement that the findings were "contrary to the law and the evidence". The motion as drawn may reasonably be construed to so state, in addition to the motion "to open the judgment, take additional testimony, . . . ," which relates to the judge's invitation to renew the motion to convert to a general creditors' suit as quoted at page 5 herin. The timely filing of the motion serves the purpose of the rule to place all parties on notice that a review by the district judge is being sought. Ordinarily the written motion is followed up with a brief or written memorandum setting forth the specific grounds, just as was done here. Here the Memorandum in Support of Motion to Alter and Amend Judgment was filed October 10, 1974, promptly after receiving copy of the findings. (Exhibit H).

"The rationale of the cases relating to informal or irregular appeals is that notwithstanding the papers filed were inaptly worded, or labeled, or even failed to used the word 'appeal', or were filed in the wrong court, yet they sufficed to show the party intended to appeal. Similarly, the application for time in which to move for a new trial gave notice of appellant's intent to so move, and was an initiation of efforts to that end."

★ ★ ★

"It is true that motion for an extension of time within which to file a motion for new trial *stated no grounds for which a new trial would be sought;* but the fact that this motion, considered as an inartificially drawn motion for new trial was so de-

fective that it could not properly be granted, *would not serve to render it non-existent." Yanow v. Weyerhouser Steamship Company,* supra.

CONCLUSION

It is respectfully submitted that when a written motion for a new trial or to alter and amend a judgment is timely filed, if entertained by the court and not objected to within time to perfect an appeal, the time allowed for appeal does not begin to run until the motion is disposed of.

Such motion, whether sound or defective, under such circumstances, is not a sham, and must await disposition by the district court before time for appeal begins to run. *Yanow v. Weyehouser Steamship Co.,* supra.

As stated in *Witt*, supra:

"It is elementary that where a motion for new trial is made in time and is entertained by the court, the time allowed for appeal does not begin to run until the motion is disposed of."

★ ★ ★

"The liberal rules of Civil Procedure must not be transformed by judicial interpretation into technical traps for the unwary. As we said in *Fishbaugh v. Armour & Co.,* 4 Cir. 185 F2d 541, 542, the rules should be liberally construed and review should not be denied on mere technicalities where this can be avoided."

Therefore, in reliance on *Thompson v. Immigration Service,* supra, and *Wolfsohn v. Hankin,* supra, it is respectfully suggested that petitioner's motion to dismiss was properly denied by the United States Court of

Appeals for the Fourth Circuit, and the petition for certiorari should be denied.

Respectfully submitted,

/S/Israel Steingold
Israel Steingold
Steingold, Steingold & Nachman
1116 United Virginia Bank Building
Norfolk, Virginia 23514

CERTIFICATE OF SERVICE

In accordance with the provisions of Rules 21 and 33, Revised Rules of the Supreme Court of the United States, I hereby certify that I have filed forty (40) copies of the foregoing Brief in Response to Petition for a Writ of Certiorari in the Clerk's Office, Supreme Court of the United States, and served three (3) copies upon Richard A. Repp, Esq., Hirschler, Fleischer, Weinberg, Cox & Allen, counsel of record for Fidelity Corporation, at 4 North Fourth Street, Richmond, Virginia 23219, his last known address, by depositing same in the United States mail, first class postage prepaid, this eighth day of July 1977.

/S/Israel Steingold
Israel Steingold

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

FILED
NOV 8 1974

REGAL WINE, INC. :
:
v. :
:
FIDELITY CORPORATION :
and :
AMERICAN FOREIGN, INC. :

CIVIL ACTION No.
NO. 73-460-R

ORDER

Deeming it proper so to do, it is ADJUDGED and ORDERED that the motion of the plaintiff for the Court to alter and amend its judgment, be, and the same is hereby, denied.

Let the Clerk send copies of this order to all counsel of record.

United States District Judge

Date: NOV 08 1974

EXHIBIT A

BEST COPY AVAILABLE

I can then recess for luncheon and decide the case this afternoon. I do need several hours for looking at the exhibits. But I am going to decide it, if I can, from the bench.

Justice delayed is justice denied. I will be in a better position to decide it today than I will be at any other time in my life, I suspect. There may be some further research that I will have to do. I will be glad to hear your arguments if that procedure is agreeable.

MR. STEINGOLD: If Your Honor please, I have here part of a summary search that I have made copies of, if the Court will permit me to leave it with the Court, and copies to opposing counsel.

THE COURT: Yes, I would like to have it.

MR. STEINGOLD: This is part of a summary that I prepared.

THE COURT: Let me ask you this Would you prefer to have a luncheon recess at this time and then make your arguments?

MR. ALLEN: Judge, I am willing to waive closing argument, unless the Court wants to hear it.

What is the Court's pleasure? I can make it detailed, factual, or whatever the Court wants to do.

THE COURT: Well, I don't want you to talk about the facts. Talk about the law a little bit, if you wish. I have to get my thoughts assimilated.

Mr. Steingold, do you wish to make argument?

MR. STEINGOLD: It really doesn't make any difference, if Your Honor please.

THE COURT: I have so much to do, don't burden me with something that doesn't make any difference.

MR. STEINGOLD: What I mean —

THE COURT: I know.

EXHIBIT B

MR. STEINGOLD: I don't know what the Court thought I meant; I said it didn't make any difference whether I ate first or ate lunch later. I can make whatever argument you wish.

THE COURT: Well, if there is no objection, I will excuse the court reporter so he can rest up for the findings of fact and conclusions of law that I will dictate to him.

MR. ALLEN: No objection, Judge. We will miss him, but I know he would like to leave.

THE COURT: Mr. Steingold, do you have any objection?

MR. STEINGOLD: No, sir.

(The reporter was excused at 12 o'clock.) (Findings of fact and conclusions of law previously transcribed.)

I certify that the forgoing is a true and correct transcript.

/S/Gilbert Frank Halasz
Gilbert Frank Halasz
Official Court Reporter

United States District Court

FOR THE

EASTERN DISTRICT OF VIRGINIA - RICHMOND DIVISION

CIVIL ACTION FILE NO 73-460-R

REGAL WARE, INC.

vs.

FIDELITY CORPORATION and AMERICAN FORESIGHT, INC.

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Robert R. Merhige, Jr., United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff, REGAL WARE, INC., recover of the defendant, AMERICAN FORESIGHT, INC., the sum of TWO HUNDRED TEN THOUSAND, FIVE HUNDRED SEVENTY ONE AND 96/100 DOLLARS ($210,571.96) with legal interest thereon at the rate of Six Per Cent (6%) per annum from the 3rd day of July, 1973 until paid,

It Is Further Ordered and Adjudged that the defendant, FIDELITY CORPORATION, recover of the plaintiff, REGAL WARE, INC., its cost of action.

Dated at Richmond, Virginia, this 22nd day of August, 1974.

W. Parker Porter, Jr., Clerk

By: Deputy Clerk

EXHIBIT C

BEST COPY AVAILABLE

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REGAL WARE, INC.	:	
Appellant	:	
V.	:	CASE NO. 75-1219
FIDELITY CORPORATION	:	
APPELLEE	:	

AFFIDAVIT

STATE OF VIRGINIA)
CITY OF Norfolk) SS

Israel Steingold, being duly sworn, deposes and says:

1. He was attorney of record in the trial of action styled Regal Ware, Inc. v. American Foresight, Inc. and Fidelity Corporation, Civil Action No. 73-460-R, which was tried in the United States District Court at Richmond before the Honorable Robert R. Merhige, Jr., without a jury commencing on August 15, 1974 and terminating on August 19, 1974.

2. After the cause was argued on the morning of August 19th, the District Judge stated that he would prepare his Findings of Fact and Conclusions of Law and would dictate them to the official Court Reporter later that day, and that it would not be necessary for counsel to be present, that the Reporter would forward a copy to counsel.

3. Counsel for plaintiff thereupon returned to his office at Norfolk, expecting copy promptly.

4. On August 21, 1974, he received copy of the judgment entered by the Clerk the previous day, copy of which is attached hereto, but nothing from the Court

EXHIBIT D

Reporter.

5. A pre-trial hearing being set before Judge Merhige in another matter for August 22, 1974, his associate, Jeffrey M. Steingold, attended and attempted to obtain a copy of the Judge's Findings from the Court Reporter. The Reporter was not available

6. Affiant then tried to reach the Reporter by telephone and was informed by the Clerk that he was out of town, on vacation, as affiant recalls.

7. Accordingly, affiant telephoned Judge Merhige, explained the dilemma, that he wished to file a motion for a new trial feeling that a review would be helpful but could not state the grounds, not knowing the basis for the adverse decision in favor of Fidelity Corporation. Judge Merhige authorized affiant to file the motion, reserving the right to assign grounds when copy of the court's findings were received.

8. Pursuant thereto counsel for Plaintiff-Appellant promptly filed Motion for New Trial and to Alter and Amend Judgment on August 27, 1974, copy of which is attached hereto.

9. On September 3, 1974, affiant found that the Court Reporter was in Richmond, went to his office and requested a copy of the Findings of Fact and Conclusions of Law. He stated that he had prepared a rough draft for Judge Merhige and delivered it to him. Affiant requested that he be permitted to see a copy of the draft, it being important that he know the basis for the Judge's decision. The Court Reporter felt that he had no right to let counsel see it until approved by the Judge.

10. Counsel then went to the chambers of Judge Merhige. It developed that he was witting in Boston and

would be there for several weeks. His secretary stated that she was unable to find the copy referred to by the Court Reporter.

11. Counsel wrote Judge Merhige for assistance in obtaining the Findings on September 6, 1974, and again on September 20, 1974. He finally learned that the Findings had been filed on September 9, 1974 by virtue of a notation at the bottom of counsel's letter to the Judge dated September 20, 1974, copy of which is attached to Appellant's Answer this day filed, received on September 27, 1974.

12. The failure to specify grounds was due to a combination of counsel's reliance on the authority of the District Judge in permitting the motion to be filed as it was, and in the belief that filing under Rule 59(c) did not require specific grounds, as indicated by comment in Moore's Federal Practice and Procedure, referred to in the accompanying Memorandum of Law.

/S/Israel Steingold
Israel Steingold

Subscribed and sworn to before me in my City aforesaid, in the State of Virginia, this 10th day of July 1975. My commission expires: May 31, 1976.

/S/Charlotte Wright
Charlotte Wright
Notary Public

September 6, 1974

Honorable Robert R. Merhige, Jr.
U.S. District Judge
Tenth and Main Streets
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight and
Fidelity Corporation
Civil Action 73-460-R

Dear Judge Merhige:

It has now been more than 15 days since you entered judgment in the above matter. In order to comply with Federal Rules of Civil Procedure, I filed a motion for a new trial and to alter or amend judgment although I did not at that time have the benefit of knowing what your Findings of Fact were or what your Conclusions of Law were.

You may recall you suggested that I file the motion and submit the reasons for the motion after receipt of a copy of your Findings of Fact and Conclusions of Law.

Should my motion be faulty because of failure to assign reasons, my time for appeal would expire on September 19, 1974, which is slightly more than a week away.

I requested a copy of your Findings from the court reporter but he stated that he could not furnish me with such copy until you had edited it. I then asked your secretary if I could see the Findings in rough so that I might have some idea of the legal situation.

You may further remember that I had suggested to you that we might ask leave to amend the proceedings to meet the technical situation if the basis for your Findings is what I suspect.

EXHIBIT E

Would it be possible for me to get a copy of your Findings of Fact and Conclusions of Law at this time with the understanding that they may not be in final form and subject to further revision?

Respectfully,

Israel Steingold

IS/kmk
cc: Richard A. Repp, Esq.
Hirschler and Fleischer
4 North 4th Street
Richmond, Virginia 23219

LAW OFFICES

STEINGOLD, STEINGOLD & FRIEDMAN

[illegible]
NORFOLK, VIRGINIA 23514
[illegible]

ASSOCIATES OFFICE
[illegible]
RICHMOND, VIRGINIA [illegible]
[illegible]

September 20, 1974

Filed Sept. 7, 1974

Honorable Robert R. Merhige, Jr.
U. S. District Judge
Tenth and Main Streets
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight and
Fidelity Corporation
Civil Action 73-460-R

Dear Judge Merhige:

The above case was tried before you on August 15 and 16, 1974. That noon when the case terminated you stated that you would announce your Findings of Fact and Conclusions of Law at 3:00 o'clock that afternoon, as I recall. You further stated that it would not be necessary for me to be present. I, therefore, returned to Norfolk.

This matter is of considerable importance to my client. If we had the benefit of your Findings of Fact and Conclusions of Law, we would know the basis for your decision in denying liability against Fidelity Corporation.

As authorized by you, I filed a motion for a rehearing without stating the legal basis for the motion with the understanding that this information would be supplied upon my receiving your Findings of Fact and Conclusions of Law. As I previously explained, I have not been able to get that information from the court reporter or from your office. Is there not some misunderstanding here.

Respectfully yours,

Israel Steingold

IS/ljs

[illegible] FINDINGS OF FACT AND CONCLUSIONS OF LAW [illegible]
FILED [illegible]. SEP 27 1974

EXHIBIT F

BEST COPY AVAILABLE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1219

REGAL WARE, INC.,

Appellant,

v.

FIDELITY CORPORATION,

Appellee.

APPELLANT'S REPLY MEMORANDUM TO MOTION TO DISMISS

PRELIMINARY STATEMENT

Although it is usual for a moving party to support his motion by a memorandum, the movant here, Fidelity Corporation, failed to do so in support of the motion to dismiss.

Appellant, Regal Ware, Inc., proceeded to file its response as required by Rules 26(c) and 27(a), Rules of Appellate Procedure. The Motion to Dismiss was served by mail on July 1, 1975, and Appellant's Response was served on July 10, 1975, within the time permitted by Rule 26(c). Now, 23 days later, appellee belatedly files its initial memorandum. The basis of appellee's motion being a technical delay in filing notice of appeal, it seems to be a case of the pot and the kettle.

Furthermore, appellee has resorted to the highly unusual procedure of an *ex parte* conference with the

EXHIBIT G

District Judge whose findings of fact and law are sought to be reversed, to obtain his assistance in opposition to this appeal. It appears from the letter from the District Judge filed by appellee as an exhibit with his belated "Memorandum in Support of Motion to Dismiss", that counsel had submitted a "statement" for the signature of the District Judge without notice to counsel for appellant or an opportunity to be heard. It is counsel's understanding that it had always been the practice of Chief Judge Hoffman to have the official court reporter take minutes of all informal conferences such as this.

It appears from Judge Merhige's letter that counsel for appellee discussed with him the affidavit of counsel for appellant filed with appellant's response to the motion to dismiss. He does not "recall", but then, for the "benefit" of this Court he proceeds to *recall* matters on August 6, 1975, which took place on August 19, 1974. Appellant objects to the inclusion of such irregular matter in the record of this appeal.

Appellant vigorously objects to this highly irregular procedure in not having been given the same opportunity to refresh the Judge's recollection as was apparently given to counsel for appellee.

The Court Reporter's official transcript does not contain the excerpt dated August 20, 1974. See page 511 of the transcript. The information contained in the excerpt filed by appellee is absolutely new to counsel as of receipt of copy on August 7, 1975, as an exhibit with appellee's "Memorandum". The District Judge had stated at the termination of the evidence, which was before the luncheon recess, that we could argue the matter then or come back later. (Transcript P. 511). It was decided to argue the case before the luncheon recess. Upon conclusion of argument, Judge Merhige stated he would

consider the matter and dictate his conclusions that afternoon at 3:00, that it would not be necessary for the parties or counsel to be present. This is indicated by the Court's remark that the court reporter would be excused during argument "so he can rest up for the findings of fact and conclusions of law that I will dictate to him." Now we find from the exhibit for the first time that the Court dictated its findings the following morning. Judge Merhige had stated that it would not be necessary for anyone to be present when he dictated his findings, that counsel could get a copy from the Court Reporter.

This is where the trouble began, as related in the affidavit of counsel for appellant. The findings were not forthcoming.

The Court Reporter could not be reached. He had left for vacation or was away. This necessitated the call to the District Judge, who suggested the filing of the motion with reservation of specific grounds until after his findings became available. The District Judge then left on an assignment to Boston. Upon the Reporter's return to Richmond he stated that he was not at liberty to show the rough draft of the Court's findings to counsel until they had been approved. The Judge's secretary could not permit counsel to see the Judge's copy, stating that she could not find it.

FACTS

FACT ON

The letter of counsel for appellant to Judge Merhige dated September 20, 1974, attached to Appellant's Response to Motion to Dismiss, recited the facts then fresh in mind, and they bear out the foregoing. Judge Merhige did not dispute or contradict them, so it is respectfully suggested that this Court may consider the

facts there stated as established.

FACT TWO

The flat contradictory statement contained in Paragraph 4, page 3, of appellee's memorandum that *"counsel for Regal Ware, Inc. could not have received a copy of the judgment order on August 21, 1974, as set forth in his affidavit inasmuch as that order was not entered until August 28, 1974,"* is a charge that counsel made a false statement under oath. This is a serious charge. As the Chinese proverb goes, one picture is worth a thousand words. See copy of judgment order attached hereto dated August 20, 1974, under the seal of the Court, attested by the Clerk. The date of "August 21, 1974" appearing at the bottom right-hand corner indicates the date received in counsel's office at Norfolk.

What brought on the *nunc pro tunc* order of August 28, 1974, was the request of counsel for appellant that the Clerk enter separate judgments as required by Rule 58, Federal Rules of Civil Procedure.

FACT THREE

Counsel for appellee follows the foregoing charge of bad faith with another, in the form of a question:

> "Why did counsel for Regal Ware, Inc. deem it necessary to file a motion to amend, the date of the certification on which is August 27, 197(5)4, when ostensibly he was not even aware on that date of the decision?"

As shown in the comments under foregoing FACT TWO, counsel *had* received the *joint* judgment order on August 21, 1974. Obviously the Motion to Alter and Amend was filed before receipt of the *nunc pro tunc*

order. Do the Clerk's records not show that it was received in that office on August 28th or 29th? Counsel does not say, he merely seeks to discredit his opponent by innuendo.

In the letter solicited by counsel for appellee, dated August 6, 1975, Judge Merhige states that he "would be inclined to believe 'I' made no stronger statement to Mr. Steingold telephonically than is contained in my letter of December 26th . . ." This is not a contradiction of counsel's statement under oath that Judge Merhige "authorized affiant to file the motion, reserving the right to assign grounds when copy of the court's findings were received". (Paragraph 7 of counsel's affidavit). This was almost identically the situation in *Witt v. Merrill*, cited in appellant's original memorandum. See discussion in appellant's memorandum in support of its answer to Motion to Dismiss, at pages 2 and 3. Almost the only differences are (1), the parties and (2), the Witt motion was oral and without grounds, and here the motion was written and duly filed, pursuant to the authorization of the District Judge. Otherwise the alternative would have been to file Notice of Appeal, a very simple procedure.

FACT FOUR

After receiving a copy of the court's findings, counsel filed documented and detailed requests to alter and amend on October 10, 1974. He requested oral hearing on the motion. See copy of letter to Judge Merhige dated November 22, 1974, attached hereto. No reply memorandum was filed by appellee and no date for argument was set.

Then counsel for appellant Regal Ware learned, through a pleading filed by counsel for appellee in a companion case in the Circuit Court of the City of Richmond, Division II, that Judge Merhige had entered

an order on November 8, 1974, denying the Regal Ware motion. To this day counsel for Regal Ware has not received a copy of that order from the Clerk of the District Court. He obtained a copy from the record after it was lodged in this court in order to include it in his appendix. The fact that the notice of appeal was timely filed was therefore purely by chance. (See copy of letter to Judge Merhige dated December 3, 1974, hereto attached).

This situation was apparently what brought on Judge Merhige's critical letter of December 26, 1974, in which he said:

> "Your letter of November 25th was deliberately not replied to."

What probably happened was that the Clerk, by inadvertence, sent three copies of the order of November 8th to counsel for Fidelity. What prompts this thought is that in the course of oral argument in the Richmond Circuit Court in the companion case, appellee's attorney, Mr. Repp, tendered for the record there *three* copies of that order under the seal of the District Court. The court reporter's notes of the hearing on April 18, 1975, in that case, may show comments of counsel for Regal Ware in that connection, to the effect that "this probably explains why counsel for Regal Ware did not get a copy of that order."

This unusual situation, for which counsel for Regal Ware could not remotely be blamed, apparently upset Judge Merhige, as indicated by the strong language used.

Counsel for Regal Ware obtained the wording of the order of November 8, 1974 by a long distance telephone call to the District Court Clerk at Richmond on December 4, 1974, according to notation in counsel's file. (See copy attached hereto). On the same day Notice of Appeal

was filed.

CONCLUSION

This has truly been an unusual situation. Counsel for Regal Ware did what appeared to be proper. Whatever caused delay or failure to supply copies of orders or copy of findings cannot be traced to counsel for appellant. The only criticism might be that he did not have to take the risk embodied in following the suggestion of the District Judge in filing his motion under Rule 59 FRCP, reserving statement of grounds. He did so rather than abruptly filing notice of appeal without giving the District Judge the opportunity to alter and amend his findings. It was sincerely felt that when the record and the law were presented to the District Judge he would alter or amend his findings to conform to the evidence as counsel saw it, or permit the amendment of the action to a general creditors' suit to meet the Judge's objections to the form of action stated in the record. This is covered in Appellant's Brief, pages 48-50.

This matter is of entirely too great importance to cut off Regal Ware's rights by summary dismissal of its appeal on a technical error of this type under existing circumstances. The Supreme Court and this Court have held that the grounds for dismissal here urged should be overruled.

It is respectfully submitted that Regal Ware should be given its day in court, that the motion to dismiss should be overruled.

Israel Steingold
Counsel for Regal Ware, Inc.
Appellant

I hereby certify I served a copy of the foregoing Reply Memorandum on counsel for defendant-appellee by mailing a copy to the offices of Richard A. Repp, Esq., Hirschler & Fleischer, 4th and Main Streets, Richmond, Virginia 23219, on this 13th day of August 1975.

Israel Steingold

November 22, 1974

Honorable Robert E. Merhige, Jr.
United States District Judge
10th and Main Street
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight, Inc.
CA # 73-460-R

Dear Judge Merhige:

I filed Motion for a New Trial and to Alter or Amend Judgment on August 27, 1974. At that time your court reporter was out of town and I could not get a copy of your Findings of Fact and Conclusions of Law. You told me to go ahead and file the motion and then file the grounds after obtaining the transcript of the Findings.

The following week I was in Richmond and went by the court reporter's office. He stated he had transmitted the Findings of Fact and Conclusions of Law to you in rough form for proofreading and could not let me see a copy of that draft. I went to your office. Your secretary stated that you were out of town and that she did not know where the copy of the rought draft could be found. I assume she felt it unwise to let me see it without specific authority from you.

I then wrote you on September 6, 1974 asking whether it would be possible for me to get a copy at that time with the understanding that it might not be in final form and subject to further revision. I received no reply.

I wrote you again on September 20, 1974 calling this to your attention. My letter was returned with a notation that your Findings of Fact had been lodged in the Clerk's

office on September 9, 1974.

I then promptly prepared a memorandum in support of my motion and have been awaiting notice for you of a hearing date. No reply memorandum has ever been

received from opposing counsel. In order to avoid complications relating to the time element, I would appreciate a date for hearing my motion.

Respectfully yours,

Israel Steingold

IS/kmk
cc: Richard A. Repp, Esq.

December 3, 1974

Honorable Robert E. Merhige, Jr.
United States District Judge
Tenth and Main Streets
Richmond, Virginia

Re: Regal Ware, Inc.
Vs. American Foresight, Inc.
CA # 73-460-R

Dear Judge Merhige:

On November 22 I wrote you with reference to my pending Motion for a New Trial and to alter or Amend Findings. My request was that we have a date for hearing my motion, no reply memorandum having been filed.

Much to my surprise I find from a pleading filed by Hirschler and Fleischer in the Circuit Court of the City of Richmond that my motion was denied by order dated November 8, 1974.

The clerk did not furnish me with a copy of that order. My time for appeal expires at the end of this week.

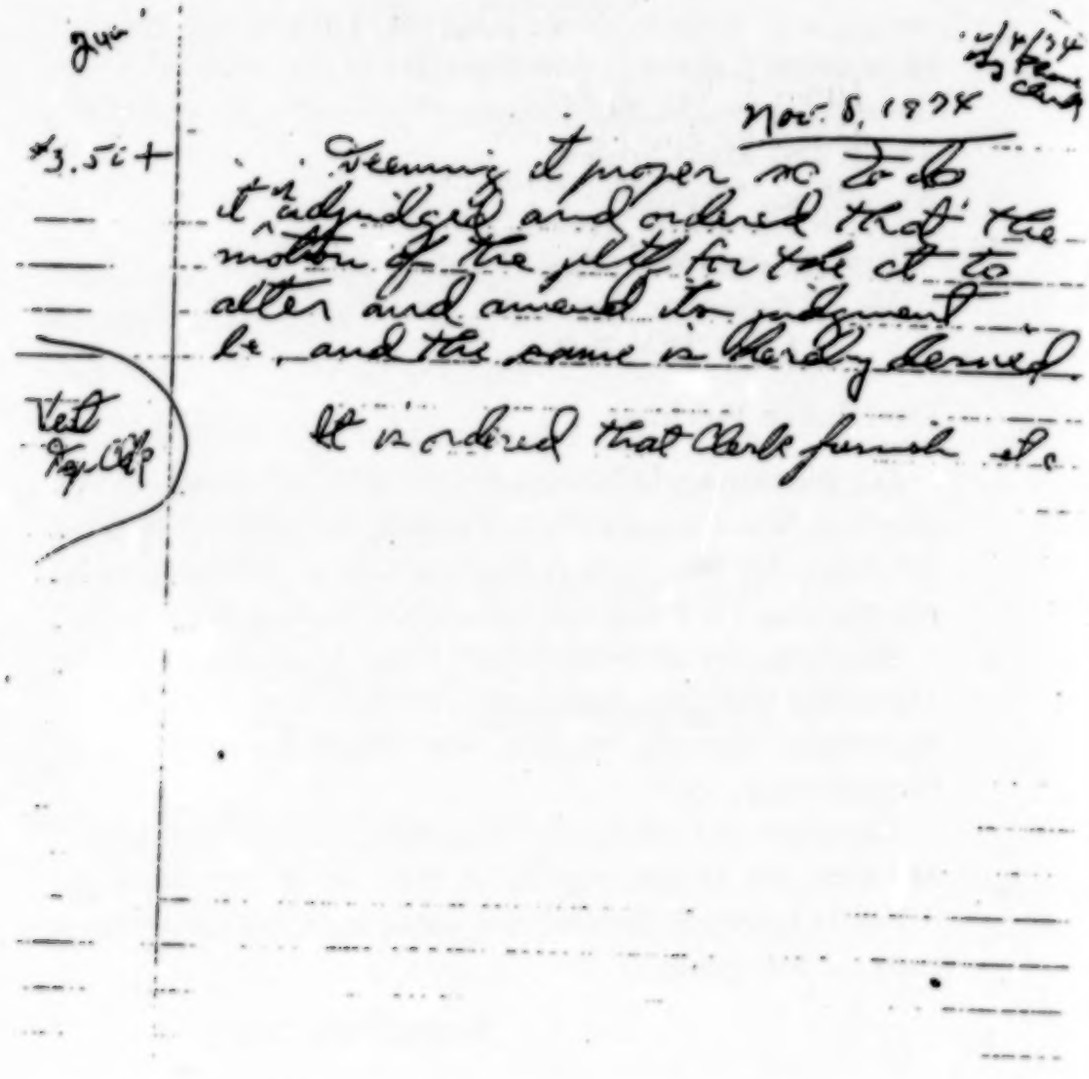
Could I get you to have the clerk to furnish me with a copy of this order.

Respectfully yours.

Israel Steingold

IS/kmk

PART OF EXHIBIT G


Nov. 8, 1974
Seeming it proper so to do
it is adjudged and ordered that the
motion of the plff for the ct to
alter and amend its judgment
be, and the same is hereby denied.
It is ordered that Clerk furnish cc

PART OF EXHIBIT G

BEST COPY AVAILABLE

October 23, 1974

James F. Pascal, Esq.
Hirschler and Fleischer
2nd Floor Massey Building
4th and Main Streets
Richmond, Virginia 23219

Re: Regal Ware, Inc.
Vs. American Foresight, et al
Civil Action #73-460-R

Dear Mr. Pascal:

Upon my return to Norfolk I found your letter of October 14, 1974 enclosing Judge Merhige's Findings of Fact and Conclusions of Law. I have finally obtained a copy from the clerk's office after several attempts to see a rough draft within ten days of the trial and several weeks later again. When I was in Richmond I tried to contact the court reporter but he was away and Judge Merhige's secretary was away also. The lady who took her place could give me no help.

I finally located Judge Merhige in Boston and he informed me that he had filed the Findings on September 9, 1974. Why I could not get a copy until this late date I do not understand. It is a most unusual situation.

I assume also that you have received copy of my memorandum in support of the motion filed in August pursuant to Rule 59(a)(e).

Yours very truly,

Israel Steingold

EXHIBIT H

IS:lad

cc: W. Fraley Powers, Jr., Clerk
United States District Court
Richmond, Virginia

October 14, 1974

Israel Steingold, Esquire
Steingold, Steingold & Friedman
1116 United Virginia Bank Building
Norfolk, Virginia 23514

Re: Regal Ware, Inc. v. American Foresight, et al
Civil No. 73-460-R

Dear Mr. Steingold:

On or about August 27, 974, this office received, by mail, a motion filed by you on behalf of the plaintiff in the above matter. This motion was filed pursuant to Rule 59 (a) and (e) of the Federal Rules and provided that the reasons for filing same would be assigned upon receipt of the transcript of the Findings of Fact and Conclusions of Law. These were filed on September 9, 1974, and in the event that you have not received a copy, I am enclosing one for your reference.

Since it has been in excess of one month since the date upon which the Court's Findings and Conclusions were filed, it occurs to me that it is now incumbent upon you to bring your motion forward for further disposition. I believe that it is Judge Mehrige's normal practice to have these matters fully briefed and submitted to the Court in writing prior to hearing oral argument, if oral argument is desired. you may, however, wish to confirm this for yourself.

In view of the fact that the Court's Findings and Conclusions were filed on September 9, 1974, and therefore have been available to you since that time, I feel that it would be proper for you to pursue your motion within the next two weeks and to take such further action as you deem necessary in

EXHIBIT I

order to have the motion ultimately resolved one way or the other. In the event that you fail to take the appropriate action within two weeks, you should be advised that I intend to move the Court to dismiss the motion.

I trust that you will keep me informed of any further developments pertaining to the disposition of your motion and I assure you that I will make every effort to accommodate your schedule. If you have any questions, please do not hesitate to contact me.

Very truly yours,

James F. Pascal

JFP/llh
Enclosure

cc: W. Farley Powers, Jr., Clerk